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February 3, 2003

**MEMORANDUM TO:** Faryar Shirzad  
Assistant Secretary  
for Import Administration

**FROM:** Joseph A. Spetrini  
Deputy Assistant Secretary  
for Import Administration, Group III

**SUBJECT:** Issues and Decision Memorandum for the Less Than Fair Value  
Investigation of Silicon Metal from the Russian Federation

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**SUMMARY:**

We have analyzed the comments and briefs of interested parties in the less than fair value investigation of silicon metal from the Russian Federation (“Russia”). As a result of our analysis, we have made changes from the Notice of Preliminary Determination of Sales at Not Less Than Fair Value and Postponement of Final Determination: Silicon Metal from the Russian Federation, 67 FR 59253 (September 20, 2002) (“Preliminary Determination”). The specific programming changes for Bratsk Aluminum Smelter (“BAS”) and Rual Trade Limited (“RTL”) can be found in our Analysis Memorandum of Bratsk Aluminum Smelter and Rual Trade Limited: Final Determination in the Less Than Fair Value Investigation of Silicon Metal from the Russian Federation (February 3, 2003) (“BAS and RTL Final Analysis Memo”). The specific programming changes for ZAO Kremny (“Kremny”)/Sual-Kremny-Ural Ltd. (“SKU”) and Pultwen Ltd. (“Pultwen”) can be found in our Analysis Memorandum of ZAO Kremny/Sual-Kremny-Ural Ltd. and Pultwen Ltd: Final Determination in the Less Than Fair Value Investigation of Silicon Metal from the Russian Federation (February 3, 2003) (“Kremny/SKU and Pultwen Final Analysis Memo”).

We recommend that you approve the positions developed in the “Discussion of the Issues” sections of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation:

Petitioners’ Comments:

Comment 1: Egypt as a primary surrogate country

- Comment 2: Valuation of quartzite
- Comment 3: Valuation of coal
- Comment 4: Valuation of petroleum coke
- Comment 5: Valuation of wood charcoal
- Comment 6: Valuation of electrodes
- Comment 7: Valuation of rail freight
- Comment 8: Valuation of electricity
- Comment 9: Valuation of financial ratios
- Comment 10: Valuation of profit
- Comment 11: Silicon metal fines
- Comment 12: Kremny's unreported raw materials
- Comment 13: RTL's date of sale
- Comment 14: Pultwen's sales to a certain U.S. customer
- Comment 15: Discounts
- Comment 16: Brokerage and handling expenses
- Comment 17: Expenses Related to a Certain Sale

Kremny/SKU's and Pultwen's Comments:

- Comment 18: Relationship between Pultwen and the U.S. trading company
- Comment 19: Use of Adverse Facts Available regarding the U.S. trading company's sales

BAS's and RTL's Comments:

- Comment 20: Valuing of inland freight added to surrogate import values for raw materials
- Comment 21: Packing materials
- Comment 22: Electricity usage
- Comment 23: Insurance expense
- Comment 24: Labor hours
- Comment 25: Electrodes

**DISCUSSION OF THE ISSUES:**

**Comment 1: Egypt as the primary surrogate country**

Petitioners argue that it is the Department's well-established practice to use surrogate values from a single country to the greatest extent possible as stated in Ferrovanadium from the People's Republic of China. See Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the People's Republic of China, 67 FR 71137 (November 29, 2002) ("Ferrovanadium from the PRC") and accompanying Issues and Decision Memorandum, at Comment 19. Petitioners explain that the Department selected Egypt as the surrogate country and used Egyptian values to value all factors of

production and expenses, except for quartzite and charcoal. Petitioners explain that the Department used a South African price for quartzite in the Preliminary Determination, because it determined that the available Egyptian import value for quartzite was aberrational. Petitioners state that there are now two useable Egyptian quartzite prices on the record, which should be used in place of the South African quartzite price.

Petitioners contend that South Africa is not economically comparable to Russia. Petitioners explain that according to Section 773(c)(4) of the Act and 19 C.F.R.351.408(c), the Department must value the factors of production using, to the extent possible, prices in a surrogate, market economy country that (1) is at a comparable level of economic development to the non-market economy country and (2) is a significant producer of comparable merchandise. Petitioners state that according to 19 C.F.R.351.408(b), the Department focuses primarily on per capita gross domestic product (“GDP”), for assessing economic comparability between the market economy country and the non-market economy country. Thus, petitioners contend that South Africa’s 2001 per capita GDP of \$2,900 was much larger than Russia’s 2001 per capita GDP of \$1,770. Additionally, petitioners argue that the Department recognized that South Africa is not economically comparable to Russia, and only used a South African quartzite value in the absence of a suitable value from an appropriate surrogate country for Russia. See Memorandum from Cheryl Werner on Factors of Production Valuation for the Preliminary Determination: Preliminary Determination of Sales at Less Than Fair Value: Silicon Metal from the Russian Federation, at page 5 (September 13, 2002) (“Factors Valuation Memo”).

Petitioners argue that the Department has useable, contemporaneous Egyptian surrogate values. Petitioners note that the Department found in the Preliminary Determination that the surrogate values for Egypt on the record were “relatively recent so as not to be outdated.” See Memorandum from Edward C. Yang, Office Director to Joseph A. Spetrini, Deputy Assistant Secretary: Selection of a Surrogate Country: Preliminary Determination: Antidumping Investigation on Silicon Metal from the Russian Federation, at page 8 (September 13, 2002) (“Surrogate Country Memo”). Petitioners explain that the Department stated that it had reliable and “reasonably complete surrogate value information for Egypt.” See id and Factors Valuation Memo. Petitioners also state that since the Preliminary Determination, additional Egyptian data has been placed on the record, for inputs for which the Department previously did not have Egyptian data. Petitioners explain that the record now contains reliable and product-specific data from Egypt from for nearly all factors of production and expenses.

BAS and RTL argue that the Department failed to consider in the Preliminary Determination whether market economy price information from Russia would provide the best available information for valuing factors of production in accordance with Section 773(c)(1)(B) of the Act. BAS and RTL contend that Russia after April 2002, the effective date of Russia’s graduation to market economy status for purposes of the application of the antidumping laws, satisfies the statutory criteria as a source of market economy surrogate values. BAS and RTL state that Russia is a significant producer of silicon metal and has the same level of economic development as itself. BAS and RTL explain that the Department has Russian price information for the factors of production from a period when the Department considers

Russia to be a market economy. BAS and RTL argue that because this information provides the actual values of factors of production in Russia as a market economy, this information represents the best information for valuing the factors of production.

BAS and RTL cite Yantai Oriental Juice Co., et al. v. United States, where the Court explained that in a nonmarket economy investigation the Department calculates “what a producer’s costs or prices would be if such prices or costs were determined by market forces.” See Yantai Oriental Juice Co., et al. v. United States, Slip Op. 02-56 (“Yantai v. United States”). Also, see Union Camp Corp. v. United States, 22 CIT 267, 270, 8 F.Supp. 2d 842, 846 (1998); Tianjin Mach. Imp. & Exp. Corp. v. United States, 16 CIT 931, 940, 806 F.Supp. 1008, 1018 (1992). Additionally, BAS and RTL cite Nation Ford Chem. Co. vs United States, where the Court stated that in determining whether “information from a surrogate country is best will necessarily depend on the circumstances, including the relationship between the market structure of the surrogate country and a hypothetical free-market structure of the {non-market economy} producer under investigation.” See Nation Ford Chem. Co. v. United States, 166F.3d 1373, 1377 (Fed. Cir. 1999) (“Nation Ford”). BAS and RTL contend that the free-market structure of Russia as a non-market economy is no longer hypothetical. BAS and RTL argue that Russia’s abundant natural resources, great distances, and level of industrialization and economic development are not shared by Egypt, or any other potential surrogate country, and therefore do not accurately reflect the market forces at work in the Russian market economy. BAS and RTL argue that the Department should use market economy price information from Russia, in its final determination, because it is the best information for valuing the factors of production and cite Shakeproof Assembly Components, Div. Of Ill. Toolworks, Inc. vs. United States, in support. See Shakeproof Assembly Components, Div. Of Ill. Toolworks, Inc. vs. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

Furthermore, BAS and RTL argue that if the Department determines to not use the Russian market economy price information as surrogate values, the Department should re-examine all potential surrogate value information on the record and select the surrogate values most consistent with the Russian market economy prices. BAS and RTL explain that the Department should ensure “accuracy, fairness and predictability,” when selecting surrogate values according to Oscillating Fans and Ceiling Fans from the PRC. See Oscillating Fans and Ceiling Fans from the People’s Republic of China, 56 FR 55271, 55275 (Oct. 15, 1991). Also, see Lasko Metal Products, Inc. vs. United States, 43 F.3d 1442 (Fed. Cir. 1994). BAS and RTL contend that the Department has, in past investigations, examined whether potential surrogate values are aberrational by comparing these values with U.S. prices or world prices. See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 62 FR 6189, 6196 (February 11, 1997) (“TRBs from the PRC”); Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Poland, 58 FR 37205, 37207 (July 9, 1993) (“CTL Plate from Poland”). BAS and RTL contend that the Department has actual market price information from the investigated country with which to compare potential factor values and reject as aberrational any potential surrogate values that

are inconsistent with the available Russian market economy price information. BAS and RTL contend that the Egyptian surrogate factor values are inconsistent with the Russian market economy price information. BAS and RTL note that there is other surrogate value information on the record more comparable to the Russian market economy price information, which the Department should rely on for the final determination.

Kremny/SKU and Pultwen argue that Egypt is unsuitable as a surrogate country because it does not have a usable surrogate value for the primary factor of production in this investigation, quartzite. Furthermore, Kremny/SKU and Pultwen argue that the financial ratios from Egypt are far less reliable than the 2001 financial ratios from South Africa. Kremny/SKU and Pultwen contend that South Africa and Russia are appropriate surrogates. Kremny/SKU and Pultwen explain that South Africa has been used in recent antidumping investigations as the surrogate for Russia, is at a comparable level of economic development, and is a significant producer of silicon metal. See Kremny/SKU and Pultwen's and BAS and RTL's joint submission regarding surrogate values (July 24, 2002). Kremny/SKU and Pultwen also explain that South Africa has current and reliable public data to value all of the factors used in the production of silicon metal while the data from Egypt is not as recent, is aberrational, or is nonexistent. See id. Furthermore, Kremny/SKU and Pultwen state that South Africa has vast natural resources, including a large supply of quartzite for industrial use. See id. Kremny/SKU and Pultwen explain that surrogate values are also available from Russia. Kremny/SKU and Pultwen state that as of April 1, 2002, Russia is a market economy country for purposes of the administration of the antidumping laws. Thus, Kremny/SKU and Pultwen argue that the post-April 1, 2002, data from Russia now constitutes usable surrogate information for purposes of this investigation. Kremny/SKU and Pultwen also contend that the vast differences between the Russian market economy information on the record and the Egyptian surrogate data show that Egypt is unsuitable as a surrogate country in this investigation. Kremny/SKU and Pultwen state that the values obtained from South Africa more closely conform to the Russian market economy data.

Petitioners contend that the Department should reject using Russia as a surrogate country for Russia in this non-market economy proceeding, and should reject using the Russian values as a reasonable comparison, because doing so would be contrary to the statute. Petitioners argue that the Department recognized when it granted Russia market economy status that Russia continues to be in transition and it explicitly stated that the Department will closely examine Russian values in future market economy Russian cases and reject values that are not reflective of market considerations. Petitioners contend that several of the Russian prices submitted by BAS and RTL and Kremny/SKU and Pultwen are clearly distorted, particularly the price for electricity.

Petitioners contend that Russian values are not suitable for this proceeding because the POI for this investigation, July through December 2001, occurred prior to Russia's effective date of graduation to market economy status, April 1, 2002. Petitioners explain that for purposes of this investigation, Russia is a non-market economy. Therefore, petitioners state that according to Section 773(c)(1), for merchandise exported from a non-market economy country, the Department must base the normal

value (“NV”) on the factors of production used in producing the subject merchandise and other general expenses related to production. Petitioners explain that according to Section 773(c)(4)(A)(B) of the Act, the Department should value the factors of production using the best available information for prices or costs in one or more market economy countries that are at a comparable level of economic development to the non-market economy country and a significant producer of comparable merchandise. Petitioners argue that the statute does not account for the exporting country that is a non-market country being deemed in the same investigation to be a market economy country suitable as a source of surrogate countries.

Petitioners contend that the extensive briefing in the proceeding, in which the Department reviewed Russia’s request for market economy status, demonstrated that major distortions in the prices for important commodities continue to exist in Russia, including the prices of key inputs in this case, such as energy and transportation. Petitioners explain that the Russian electricity price of 0.34 cents per kilowatt hour (“kwh”) is much less than the very low Egyptian and South African rates of 1.65 cents per kwh and 1.39 cents per kwh, respectively. Furthermore, petitioners contend that these electricity rates are among the lowest in the world. See Silicomanganese From the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 65 FR 31514 (May 18, 2000) (“Silicomanganese from the PRC”). Petitioners explain that in Silicomanganese from the PRC, the Department found that industrial rates for 32 countries reported by the International Energy Agency (“IEA”) ranged between 2.35 and 15.72 cents per kwh. Additionally, petitioners argue that the Department in its most recent Country Commercial Guide for Russia, stated that the “uneconomically low prices” in the energy sector have “distorted the economic landscape” in that country. See Department of Commerce, Country Commercial Guide: Russia, Fiscal Year 2002, Ch. 2, “Economic Trends and Outlook,” at “The Government’s Role in the Economy.” Petitioners explain that for transportation, the Department used an Egyptian rate of \$0.196 per kilometer (“km”) per metric ton (“MT”) in the Preliminary Determination, and a comparable South African rate of \$0.0191 per km per MT is also on the record. Additionally, petitioners note that Tunisian and Polish rail freight rates of about \$0.0208 and \$0.0263 per km per MT, respectively, are on the record. Petitioners contend that the Russian rate is only \$0.0077 per km per MT, which is less than half of the rates of Egypt and Tunisia, countries at a comparable level of economic development to Russia.

Petitioners also contend that the Department cannot select Russia as the surrogate country for Russia, based on BAS and RTL’s argument that only it shares the same characteristics in terms of the level of natural resources, etc., as itself. Petitioners explain that this would lead to the Department selecting the non-market economy country as the surrogate country for itself for all cases involving countries recently graduated to market economy status. Petitioners contend that selecting Russia as the surrogate country for itself would be inconsistent with the Department’s statutory discretion to select surrogate countries, and would undercut the Department’s establishment of an effective date for market economy graduation since the Department would be required use prices from the recently graduated market economy country in non-market economy antidumping proceedings even for cases with periods of review prior to the effective date.

**Department’s Position:** We agree with petitioners. For the Preliminary Determination, we selected Egypt as our primary surrogate country, and valued all inputs, except quartzite and wood charcoal, using Egyptian surrogate values or market economy prices the Russian producers paid to suppliers located in market economy countries, as appropriate. In accordance with section 773(c)(4) of the Act, as amended, the Department must value the factors of production using “to the extent possible, the prices or costs of factors of production in one or more market economy countries that are: (A) at a level of economic development comparable to that of the nonmarket economy country; and (B) significant producers of comparable merchandise.” As noted in our Surrogate Country Memo, we determined that Colombia, Egypt, the Philippines, Thailand, and Tunisia are at an economic level of development comparable to that of Russia for this investigation. See Surrogate Country Memo, at 6. Also, see Memorandum from Jeffrey May, Director, to James C. Doyle, Program Manager: Antidumping Duty Investigation on Silicon Metal from the Russian Federation, dated April 30, 2002 (“Policy Memo”).

Next, we examined whether any of the countries listed in the Policy Memo were producers of comparable merchandise. We noted that Colombia and Egypt were the only producers of ferroalloys, while Thailand appeared to refine primary and secondary metal. See Surrogate Country Memo, at 6. According to a U.S. Geological Survey report on ferroalloys, “Ferroalloys are alloys of iron that contain one or more other chemical elements.” See See Mineral Industry Surveys, Ferroalloys 2000 Annual Review at 28.1, U.S. Geological Survey (December 2001) (“U.S. Geological Survey”). The principal ferroalloys are those of chromium, manganese, and silicon. See id. We stated in the Surrogate Country Memo that Egypt produces ferrosilicon, which we determined to be a comparable product to silicon metal, because they both: are silicon-bearing ferroalloys; are produced using nearly identical equipment<sup>1</sup>; and utilize many common inputs (including quartz, electrodes, and carbon sources such as charcoal). See id.

Additionally, we examined whether Egypt was a significant producer of comparable merchandise. As stated in the Policy Memo, the statute does not define “significant.” See Policy Memo. According to a U.S. Geological Survey report on ferroalloys, of the thirty producers of ferrosilicon, there are three approximate levels of ferrosilicon production world-wide. See U.S. Geological Survey. Egypt falls in a moderate production level of approximately 40,000 MT through 100,000 MT of ferrosilicon production, while the higher production level includes nine producers of 100,000 MT or greater. See id. There are several producers falling in the lowest category of production levels of typically less than 10,000 MT of ferrosilicon production. See id. Thus, we found in the Surrogate Country Memo that an average annual production of 44,000 metric tons of ferrosilicon since 1996, is indicative of significant ferrosilicon production facilities in Egypt. For the final determination we continue to find that Egypt’s level of ferrosilicon is not insignificant in comparison to other countries’ production of ferrosilicon,

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<sup>1</sup> The U.S. Geological Survey states that silicon metal is generally produced like ferrosilicon in submerged-arc electric furnaces. See U.S. Geological Survey.

because it has a moderate level of production.

We also found Egypt to have the most complete information from among the potential surrogate countries. See Surrogate Country Memo, at page 7. We continue to find that Egypt is at a level of economic development comparable to Russia, a significant producer of comparable merchandise, and has reasonably complete information for valuing the factors of production. Furthermore, we agree with petitioners that South Africa is not economically comparable to Russia in terms of per capita GNP. See id. As such, we cannot select South Africa as the surrogate county. However, as explained in Comment 2, we are continuing to use a South African domestic price to value quartzite, due to the lack of a suitable value for quartzite from Egypt or any other economically comparable country contained in the Policy Memo. See Policy Memo. We disagree with BAS and RTL and Kremny/SKU and Pultwen (collectively “respondents”) that there are not suitable financial surrogate ratios from Egypt. See Comment 9.

We also disagree with respondents that the market economy price information from Russia is suitable for valuing the Russian producers’ factors of production. The Department determined in its Russia Market Economy Memo, dated June 6, 2002, that effective April 1, 2002, the Department was revoking Russia’s status as a non-market economy for purposes of the Department’s antidumping and countervailing rules and regulations. See Memorandum from Albert Hsu, Barbara Mayer, and Christopher Smith through Jeffrey May, Director, Office of Policy, to Faryar Shirzad, Assistant Secretary, Import Administration: Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law, dated June 6, 2002 (“Russia Market Economy Memo”). The Russia Market Economy Memo clearly explains the Department’s procedures for administering antidumping and countervailing proceedings prior to a market economy graduation as well as post-graduation. The Department states:

There will necessarily be a period of time during which antidumping duty rates, based on the non-market economy calculation methodology, will remain in effect. For existing antidumping duty orders, the non-market economy-based rates will remain in effect until they are changed as a result of a review, pursuant to section 751 of the Act, of a sufficient period of time after April 1, 2002. **For on-going investigations, because the period of investigation pre-dates the effective date of this determination, the Department will continue to utilize non-market economy methodologies in those investigations.** See Russian Market Economy Memo (emphasis added).

Thus, because the period of investigation (July 1, 2001, through December 1, 2001) pre-dates the effective date of the Russian market economy determination (April 1, 2002), the Department has continued to utilize non-market economy methodology for this investigation. Furthermore, using Russian market economy prices is not consistent with the Department’s non-market economy methodology. The Department’s non-market economy methodology relies on the selection of a surrogate country (e.g., “other”) country to value the factors of production - this precludes use of values

from the same country as the non-market economy country under investigation. Thus, Russia as a market economy country cannot be a surrogate for itself as a non-market economy. This would in effect, be using Russian costs. The non-market methodology has never followed the practice argued by respondents. Therefore, we disagree with respondents that it is appropriate to use Russian market economy prices in this proceeding.

With respect to respondents' argument that because Egypt lacks Russia's abundant natural resources, great distances, and level of industrialization and economic development, Egypt is not a suitable surrogate country for Russia, we disagree. In selecting appropriate surrogate values, the Department uses, where possible, publicly available factor prices that are broad market averages (not export-related) contemporaneous with the POI, specific to the input in question, and exclusive of taxes. See Cut-to-Length Carbon Steel Plate from the People's Republic of China, Final Determination of Sales at Less than Fair Value, 62 FR 61972 (November 20, 1997) ("CTL Plate from the PRC"). In general, the Department is not concerned with whether the factor input in question is produced domestically or must be imported. In fact, the Department often relies on import statistics to value factor inputs. Additionally, the Department has consistently relied on the most recent World Bank data for per capita GNP in determining which countries are a level of economic development to the nonmarket economy country under investigation. In this investigation we have used World Bank data for per capita GNP for 2001, which is contemporaneous with the POI. It is important that the Department use the same data source to determine economic comparability to ensure predictable and consistent application of its practice.

We further disagree with respondents that the Russian market economy prices should be used as a "benchmark" with which to gauge other potential surrogate values' reliability. In TRBs from the PRC and CTL Plate from Poland, we compared potential surrogate values to U.S. prices or world prices when determining whether these values were aberrational. In this investigation, we also compared potential surrogate values for quartzite to U.S. prices, when determining an appropriate surrogate value for quartzite. See Factors Valuation Memo, at page 4-5. Moreover, in Silicomanganese from Kazakhstan, we compared potential surrogate values to U.S. prices when determining whether these values were aberrational. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Silicomanganese from Kazakhstan, 66 FR 56639 (November 9, 2002) ("Silicomanganese from Kazakhstan Preliminary Determination"). However, while we agree that it is appropriate to compare potential surrogate values to U.S. prices or world prices to determine whether these values are aberrational, we disagree with respondents that we should compare the potential surrogate values to Russian market economy prices in this investigation. Using post-market economy prices, even only as a benchmark to gauge the appropriateness for use of other countries' prices, is not consistent with the Department's non-market economy methodology. The Department's non-market economy methodology relies on the selection of a surrogate country (e.g., "other") country to value the factors of production, which precludes use of values from the same country as the non-market economy country under investigation.

Consequently, based on our analysis of the data on the record, we determine that Egypt is a country at the same level of economic development as Russia, is a producer of comparable merchandise, and has reasonably complete information for valuing the factors of production. In accordance with section 773(c)(4) of the Act, we are continuing to use Egypt as our primary surrogate country for valuing the factors of production for the final determination.

### **Comment 2: Valuation of quartzite**

Petitioners argue that according to Ferrovandium from the PRC, the Department prefers to use surrogate prices that are as similar as possible to the input the Department is valuing with a surrogate. See Ferrovandium from the PRC, 67 FR 71137, and accompanying Issues and Decision Memorandum at Comment 19. Petitioners explain that the Egyptian quartzite price on the record from Egyptian Ferro Alloys Company (“EFACO”), a ferrosilicon producer, is for material with a silica content of 99 percent or higher, and a particle size of between 20 and 80 mm, which is very close to the silica content and size of the quartzite used by respondents. Petitioners argue that ferrosilicon and silicon metal are silicon-bearing ferroalloys produced using nearly identical equipment in large electric furnaces and share several of the same inputs including quartzite. Petitioners explain that quartzite is smelted at high temperatures along with carbonaceous reducing agents in order to separate the oxygen and silicon and produce elemental silicon metal, for both silicon metal production and ferrosilicon production. Petitioners contend that quartzite which is suitable for smelting ferrosilicon is virtually identical to quartzite that is used to produce silicon metal. Petitioners argue that the Department should use the simple average of the two Egyptian quartzite prices and cite Mushrooms from the PRC, in support, where the Department used a simple average because it had multiple appropriate prices for an input and it was not possible to calculate a weighted-average. See Certain Preserved Mushrooms From the People’s Republic of China: Final Results of Third New Shipper Review and Final Results and Partial Recission of Second Antidumping Duty Administrative Review, 67 FR 46173, 46175 (July 12, 2002) (“Mushrooms from the PRC”).

Kremny/SKU and Pultwen contend that the source information and reliability of the price information for quartzite in Egypt discussed above is suspect, and its accuracy and contemporaneity cannot be determined from the information on the record. Kremny/SKU and Pultwen argue that the correspondence from Dr. Eid Sayed Hassan of the Chamber of Metallurgical Industries in Egypt, providing prices for certain material used in the production of ferrosilicon has critical deficiencies. First, Kremny/SKU and Pultwen explain that the document identifies quartzite as “Quartzite about,” with no further detail for this classification. Kremny/SKU and Pultwen argue that this information on “Quartzite about” cannot be accepted because it is unknown what this product is and the price provided is an approximation which may or may not be comparable to a firm price. Second, Kremny/SKU and Pultwen contend that there is no indication of the terms of delivery for the products in question, explaining whether freight and other shipping expenses are included in these prices. Third, Kremny/SKU and Pultwen note that the document is dated October 21, 2002, with no indication of the relevant time period for these prices; however, it can be concluded that these prices were not in effect

during the POI. Fourth, Kremny/SKU and Pultwen contend that the document is suspect because it is not an offer of sale for the products in question, nor does it appear to be a bona fide price list. Kremny/SKU and Pultwen argue that the document only reflects the views of an association executive about the prices for these products, and the document does not identify the source, or sources for these views. Fifth, Kremny/SKU and Pultwen note that there is a postscript added to the document by Mostafa Wali of the Industrial Union, who states: “The above are the prices of the materials required considering that there is no charcoal used in the manufacturing of ferrosilicon for the time being.” Kremny/SKU and Pultwen argue that this statement is unclear and speculate that if charcoal were to be used in the production of ferrosilicon, the prices of the materials in question might change.

Kremny/SKU and Pultwen also responded to the correspondence from Mahmoud Abd Al-Hakim Al-Refaie providing prices for inputs. First, Kremny/SKU and Pultwen contend that this document does not contain a price for quartzite, but rather for quartz, which is a different product. Second, Kremny/SKU and Pultwen argue that neither the document from Mr. Al-Refaie nor the attachment appears to be provided by EFACO. Third, Kremny/SKU and Pultwen note that in the document, Mr. Al-Refaie states that “These prices could be confirmed by next Sunday...,” which would have been October 27, 2002. Kremny/SKU and Pultwen argue that petitioners stated that “our Egyptian researcher has told us that the prices were confirmed...” but failed to provide evidence of confirmation of the effective date of the prices in question. Therefore, Kremny/SKU and Pultwen contend that from the context of the document it can be concluded that these prices were not in effect during the POI. Lastly, Kremny/SKU and Pultwen argue that these documents are not offers for sale, and they do not appear to be price lists from the suppliers of these products. Rather, Kremny/SKU and Pultwen explain, these documents appear to be prices between EFACO and suppliers during an unspecified period of time. Thus, Kremny/SKU and Pultwen argue the Department should not use these Egyptian values for the final determination.

BAS and RTL argue that the Egyptian surrogate value price information, submitted by petitioners for valuing quartzite, charcoal, and coal, are not price lists. BAS and RTL contend that one of the documents is a list of values provided by the General Manager of the Chamber of Metallurgical Industries to the General Manager of the Industrial Union. BAS and RTL argue that the other documents are unconfirmed notes of a phone conversation with a “companion” at EFACO. BAS and RTL argue that the source documents do not identify whether these were prices from either a buyer or seller of raw materials, and whether the individuals had any direct personal knowledge of the prices at which these materials are bought and sold. Additionally, BAS and RTL argue that the source documentation does not provide evidence that the Egyptian price information relates to or derives from actual sales or purchases of the raw materials. Thus, BAS and RTL contend that the Egyptian price information is not a reliable source of information from which the Department can derive surrogate values and should not be used in the final determination.

BAS and RTL also argue that the Egyptian price information is from a period after the POI for this investigation. BAS and RTL contend that there is no price index information available to adjust the

data to reflect prices during the POI. Furthermore, BAS and RTL argue that the Egyptian price information is not the best information available for valuing the factors of production, in accordance with Shakeproof Assembly Components v. United States. See Shakeproof Assembly Components, Div. Of Ill. Toolworks, Inc. v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (“Shakeproof Assembly Components v. United States”). BAS and RTL argue that the factor value information from Egypt does not accurately reflect the market forces at work in the Russian market economy.

BAS and RTL contend that the Egyptian price information for quartzite relate to a higher quality of quartzite than is used in the production of silicon metal. BAS and RTL explain that the quartzite value relates to quartzite with a maximum of one percent impurities (99 percent or higher silica content), while BAS uses quartzite with as much as twice the level of impurities. BAS and RTL argue that should the Department use this quartzite value to value BAS’s quartzite usage, the Department should make an adjustment to account for the difference in the quality of quartzite being used in addition to the adjustment for inflation. Additionally, BAS and RTL argue that since no delivery term is specified for the quartzite price, the Department should not include an additional amount for freight in its surrogate value, but assume the value is a delivered price.

BAS and RTL argue that the Department used a quartzite value from a reliable source of an appropriate quality of quartzite that is used in the production of silicon metal in the Preliminary Determination, and should continue to do so for the final determination. BAS and RTL argue that should the Department determine the South African quartzite value used in the Preliminary Determination was improper, then the Department should use the Russian market economy price of quartzite.

Petitioners contend that since the Preliminary Determination, useable Egyptian prices for quartzite have been placed on the record. Petitioners argue that these Egyptian prices are for quartzite of a comparable size and chemical composition to that used by the Russian producers. Petitioners argue that the South African quartzite value is not appropriate because South Africa is not economically comparable to Egypt, is for material which includes fines, and is not similar to the lump quartzite used by the Russian producers. Petitioners contend that the Department’s practice is to use surrogate prices that “are as similar as possible to the input for which a surrogate value is needed,” thus the Department should use the more product-specific Egyptian quartzite values for the final determination. See Ferrovandium from the PRC, 67 FR 71137 and accompanying Issues and Decision Memorandum, at Comment 19.

**Department’s Position:** We agree with respondents, in part. We continue to find that the South African domestic price for quartzite used in the Preliminary Determination is the most appropriate value for valuing quartzite. The Department was not able to locate any useable import values for quartzite from countries that are at a level of economic development comparable to Russia. See Factors Valuation Memo, at page 5. We noted in the Factors Valuation Memo that Egypt’s volume of imports of quartzite was only 298 MT in 1999 and the unit value for Egypt of \$211.41/MT was aberrationally

high when compared to the U.S. price for quartzite for use in the production of silicon metal and ferrosilicon of \$17.81/MT. Thus, we determined that the Egyptian value for quartzite was aberrational and, therefore, unusable for purposes of the Preliminary Determination. See id. We also noted that despite extensive searching, the Department was not able to locate any UNCTS import statistics for quartzite from other countries that are at a level of economic development comparable to Russia in terms of per capita GNP and which produce subject merchandise or like product as identified in the Policy Memo. See id. We found that only the Philippines and Tunisia imported quartzite; however, the Philippines only imported from countries that the Department recognizes as either a non-market economy, or that maintain non-specific export subsidies: China; Indonesia; and Korea; and Tunisia had 1,138 MT imports in 2000, but had an aberrationally high unit value of \$128.81/MT, when compared to the U.S. price for quartzite. Thus, we found the South African domestic price for quartzite crusher works, which includes aggregate grades of quartzite from 0.0625 mm to greater than 37 mm, was most appropriate for valuing “lump” quartzite used in silicon metal production by the Russian producers.

We disagree with petitioners that the recent Egyptian values for quartzite, placed on the record since the Preliminary Determination, are more appropriate. The Egyptian values for quartzite, coke and coal appear to have several deficiencies. While these values have been provided by Egyptian individuals, there is little to no supporting documentation. The correspondence refers to price lists obtained from the general manager of the Chamber of Metallurgical Industries and from a member of the Board of Directors of the Holding Company of Chemical Industries. However, it is unclear whether the prices refer to prices paid by a specific company or industry, or represent the Egypt-wide price for quartzite, coke, and coal. It is further unclear whether these prices represent actual transactions between parties. The first correspondence states that it contains “the materials’ prices of the materials used in the production of ferrosilicon.” The correspondence does not identify the source of this data. The correspondence also states that “the above are the prices of the materials required considering that there is no charcoal used in the manufacturing of ferrosilicon for the time being.” Wood charcoal was used by the Russian producers in the production of silicon metal during the POI. As properly noted by respondents, the correspondence does not indicate whether the price of these materials would change with the inclusion of wood charcoal as an input in the production process of ferrosilicon. The first correspondence provides no specifications for any of the materials quoted. Additionally, the first correspondence provides no time period for which these prices are in effect, other than the date of the correspondence, October 21, 2002, which is more than 10 months after the POI. Finally, the correspondence does not identify whether these prices include freight charges making them delivered prices. Thus, we are rejecting the prices listed in the first correspondence as not appropriate for valuing quartzite, coke, and coal because of the above reasons.

Moreover, the prices in the second correspondence have similar deficiencies. The correspondence contains no letterhead indicating that this correspondence is representative of the Board of Directors of the Holding Company of Chemical Industries or EFACO. The correspondence states that “these prices could be confirmed by next Sunday;” however, no evidence of this confirmation was provided with the correspondence. The correspondence states that these prices are from a “phone call with one

of our companions at {EFACO}.” There is no further explanation of whether these are prices paid by EFACO to suppliers, or prices charged by EFACO for raw materials. Furthermore, this correspondence provides no time period for which these prices are in effect, other than the date of the correspondence, October 24, 2002, which is more than 10 months after the POI. Thus, we are rejecting the prices listed in the second correspondence as not appropriate for valuing quartzite, coke, coal, and wood charcoal because of the above reasons.

We also note that in Plate from Ukraine, the Department states that “In general, the Department will not seek information from particular producers in the surrogate country to value material inputs or electricity.” See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 FR 61764 (November 19, 1997). Therefore, it has generally been the Department’s practice not to seek or use data from producers of comparable merchandise located in a surrogate country to value material inputs, such as quartzite, coke, coal, and wood charcoal where better data is available. Thus, we have continued to use the South African domestic price for silica in 1999, provided by the Department of Minerals and Energy of South Africa. Additionally, the Department has the discretion to deviate from the countries listed in the Policy Memo when there are no other appropriate values from countries that are more comparable in terms of economic development to Russia. South Africa is also a significant producer of silicon metal. Consequently, for the final determination, we have continued to use the South African value for silica (quartzite) used in the Preliminary Determination.

Moreover, as discussed in Comment 1, we find that it is not appropriate to use Russian market economy prices as a “benchmark” of potential surrogate values’ reliability. Thus, we are not examining the Russian quartzite value as a comparison to the South African quartzite value used in the Preliminary Determination.

### **Comment 3: Valuation of Coal**

Petitioners argue that the Department prefers to use surrogate prices that are as product-specific as possible. Petitioners explain that the Egyptian import coal value used by the Department in the Preliminary Determination is for a basket category of coal that is not limited to any particular grade of coal, or to any specific production-use, such as silicon metal. Petitioners contend that only higher-grade, low-ash coal is suitable for use in silicon metal production and cite an Infomine Report, which stated that the tendency is growing to replace charcoal with low-ash coal with an ash content of 3-4 percent. See March 7, 2002, petition, at Exhibit 7, page 16. Petitioners explain that there are two Egyptian prices on the record identified as prices for “low-ash” coal or coal containing a maximum of 5 percent ash, which they classify as low-ash. Petitioners argue that the Department should use an average of the Egyptian prices for low-ash coal, or else a simple average of all five Egyptian coal prices, which are all coal suitable for ferrosilicon production, a silicon-bearing ferroalloy that is comparable to silicon metal.

BAS and RTL note that petitioners' proposed coal value, derived from an average of the two sources of Egyptian coal price information, is more than double the value of the Egyptian import value the Department used in the Preliminary Determination. BAS and RTL argue that the two Egyptian coal prices petitioners proposed are significantly different from each other at \$181.61 per MT and \$70 per MT. BAS and RTL contend that these values are inconsistent and aberrational with the Russian market economy coal prices and other coal prices on the record. Thus, BAS and RTL argue that the Department should not use the price information for coal in Egypt for the final determination.

Kremny/SKU and Pultwen contend that the source information and reliability of the price information for coal in Egypt is suspect, as discussed above in Comment 2, and should not be used for the final determination.

Kremny/SKU and Pultwen argue that the Department incorrectly applied a market economy price to all coal used by Kremny/SKU during the POI. Kremny/SKU and Pultwen contend that the record shows that only a portion of the coal used by Kremny/SKU during the POI was the higher-priced coal purchased from a market economy. Kremny/SKU and Pultwen argue that most of the coal consumed by Kremny/SKU was a standard grade coal purchased from Russian suppliers.

Kremny/SKU and Pultwen explain that the coal purchased from a market economy was only used during September and October during the POI, according to Kremny's monthly technical reports. See Memorandum from Carrie Blozy and Catherine Bertrand, Case Analysts, to the File: Verification of Factors of Production for ZAO Kremny ("Kremny") plant in the Antidumping Duty Investigation of Silicon Metal from the Russian Federation, at Exhibit 8 (December 4, 2002) ("Kremny Verification Report"). Kremny/SKU and Pultwen state that the remaining coal was purchased from Russian suppliers. Accordingly, Kremny/SKU and Pultwen argue that the market economy price should be used only to value the quantity of market economy-sourced coal used during the POI. Kremny/SKU and Pultwen explain that a surrogate value should be used to value the quantity of Russian-origin coal that was consumed so as not to overstate the cost for this factor of production.

BAS and RTL argue that the Department used an Egyptian coal import value of \$60.83/MT in the Preliminary Determination that overstates the actual market economy cost of coal in the Russian market of \$21.52/MT. BAS and RTL explain that the Thai coal value (\$29.64/MT), the Philippine coal value (\$29.70/MT) and the South African coal value (\$18.26/MT) are all consistent with the Russian market economy coal price. BAS and RTL contend that the Department should use the actual Russian market economy coal price in its final determination, but if the Department decides not to use the Russian market economy coal price then the Department should use one of the alternative surrogate values listed above, rather than the Egyptian coal value.

Petitioners contend that the Department's practice is to "use market economy import prices to value both domestic (non-market) and imported (market economy) inputs when the market economy imports are of a meaningful quantity and identical to the domestic inputs." See Notice of Final Determination of

Sales at Less Than Fair Value: Structural Steel Beams From the People’s Republic of China, 67 FR 35479 (May 20, 2002) and accompanying Issues and Decision Memorandum, at Comment 10. Petitioners note that Kremny did not report separate per-unit consumption rates for various categories of coal, but treated all coal consumed by Kremny as identical. Due to the proprietary nature of this issue, for further discussion please see the Kremny/SKU and Pultwen Final Analysis Memo. Additionally, petitioners argue that alternatively the Department should use a surrogate value for low-ash coal. Petitioners note that there are two Egyptian low-ash coal prices on the record.

Petitioners contend that, as discussed above in Comment 1, the Department should not use the Russian prices to compare to other potential surrogate values. Petitioners argue that the source documentation for the Russian price for coal, states that the price is for “thermal” coal, which is coal used as a heat source and not as a reducing agent in a metallurgical process. Additionally, petitioners note that the Russian price for coal is for a maximum ash content of 15 percent and a maximum sulfur content on one percent. Petitioners explain that this is inappropriate because the Russian producers use a higher-purity low-ash coal. Petitioners also contend that the South African value for coal is not appropriate because South Africa is not economically comparable to Russia, and because the value is for generic “bituminous” coal, which is not identified as low-ash coal. Petitioners argue that the Thai and Philippine value for coal is not appropriate because Thailand and the Philippines do not produce a comparable ferroalloy product, and because the values are for a less-specific basket category of coal. Therefore, the Department should use the Egyptian coal value in the final determination.

**Department’s Position:** We agree with petitioners, in part. For the final determination we have continued to use the 1999 UNCTS Egyptian import value for coal to value all of BAS’s coal usage, and the market economy purchases of coal from a market economy supplier to value all of Kremny/SKU’s usage.

With respect to Kremny/SKU’s argument that the Department incorrectly applied a market economy price to all coal used by Kremny/SKU during the POI, we note that we did not use the price for coal in the Preliminary Determination, to which they are referring. Kremny/SKU and Pultwen purchased coal from Country A and Country B during the POI. In the Factors Valuation Memorandum, we stated that we did not consider Country A to be a market economy country, but we did consider Country B to be a market economy country. See Factors Valuation Memorandum, at page 6. Thus, in accordance with 351.408(c)(1) we used the coal price from Country B to value Kremny/SKU’s usage of coal, because it is a market economy country and the quantity purchased was a meaningful quantity during the POI. See id.

Kremny/SKU and Pultwen are citing the coal purchased from Country A, which is not a market-economy country. See Factors Valuation Memorandum, at page 6. The coal price from Country A was discussed in the Kremny Verification Report, and contained in Exhibit 8, but was not purchased from a market economy country (Country B), and is not the price used in the Preliminary Determination to value Kremny/SKU’s coal usage. Due to the proprietary nature of this issue, for further discussion

please see Kremny/SKU and Pultwen Final Analysis Memo. We have continued not to use the price to which Kremny/SKU refer to from Country A, as this coal was not purchased from a market economy country.

With respect to Kremny/SKU and Pultwen's argument that the market economy-sourced coal represents a higher-priced coal, unlike the standard grade coal sourced domestically from Russian suppliers, we note that Kremny/SKU and Pultwen were referring to the coal purchased from Country A, which we do not consider to be a market economy country. We also note that Kremny/SKU purchased a significant amount of market economy-sourced coal from Country B during the POI, and that Kremny/SKU did not record this coal usage separately. Due to the proprietary nature of this issue, for further discussion please see Kremny/SKU and Pultwen Final Analysis Memo.

We agree with petitioners that the Department's practice is to use surrogate values that are as product-specific as possible. While a surrogate value for low-ash coal may be more appropriate for valuing the coal used by BAS in the production of silicon metal, there is no useable surrogate value identified as low-ash coal on the record of this proceeding. Therefore, we have continued to use the 1999 UNCTS Egyptian import value for coal to value BAS's coal usage for the final determination. We rejected the Egyptian price information for coal and low-ash coal, as discussed Comment 2. Additionally, we find that use of the market economy price for coal for valuing Kremny/SKU's coal usage, as discussed above, is appropriate.

We disagree with BAS and RTL that the Egyptian import value for coal is aberrational. While the Thai coal value, Philippine coal value, and South African value appear to be approximately half the value of the Egyptian coal import value of \$60.83/MT, Egypt is the primary surrogate country for this investigation. Moreover, the Philippines does not produce comparable products and South Africa is not a comparable level of economic development to Russia. We noted in the Preliminary Determination that Thailand appears to refine primary and secondary metal, and only used a Thai value for wood charcoal when no useable Egyptian value could be found. For coal, we have a useable Egyptian value for coal on the record, which was also used in another non-market economy case involving a silicon-bearing ferroalloy. See Silicomanganese from Kazakhstan. Therefore, we have continued to use the 1999 UNCTS Egyptian import value for coal to value BAS's coal usage.

Moreover, as discussed in Comment 1, we find that it is not appropriate to use Russian market economy prices as a "benchmark" of potential surrogate values' reliability. Thus, we are not examining the Russian market economy coal value as a comparison to the Egyptian coal value used in the Preliminary Determination.

#### **Comment 4: Valuation of Petroleum Coke**

Kremny/SKU and Pultwen argue that the Department improperly used a surrogate value for coke to

value petroleum coke, which is used by the Russian producers to make silicon metal. Kremny/SKU and Pultwen explain that petroleum coke is a byproduct of the petroleum refining process, whereas coke is a refined product produced by superheating coal and is often used in blast furnaces to manufacture steel. Kremny/SKU and Pultwen explain that petroleum coke is sometimes referred to as coke, but that they did not use coke (refined coal) in the production process.

BAS and RTL argue that the Egyptian coke import value is nearly fifteen times the published coke price in the Mediterranean market. Additionally, BAS and RTL explain that the actual coke prices in Russia are consistent with the published Mediterranean market price. BAS and RTL contend that Egyptian coke value is aberrational, and therefore, the Department should use the Russian market economy coke price, or a Mediterranean market value that is consistent with the Russian market economy coke price, in its final determination.

Petitioners contend that, as discussed above in Comment 1, the Department should not use the Russian prices to compare to other potential surrogate values. Petitioners argue that the Mediterranean market price for coke suggested by respondents is not identified with any specific country, particularly one that is economically comparable to Russia. Petitioners explain that this value is for coke that contains six percent sulfur. Petitioners contend that the source documentation for the Mediterranean market price shows that the price for coke increases as its sulfur content decreases and thus using this price would understate the cost of the coke consumed by the Russian producers, because they use a lower sulfur content. Petitioners argue that the Department should use either the Egyptian import value for coke, the prices paid by Egyptian ferroalloy producers for coke, or obtain Egyptian import data for petroleum coke for the final determination.

On January 28, 2003, the Department placed publicly available surrogate value data for petroleum coke on the record. The Department provided all parties an opportunity to comment on this value.

Petitioners contend that the Egyptian import value for petroleum coke now in the record satisfies the Department's criteria for selection of surrogate values. Petitioners explain that this value is from the Department's chosen surrogate country, is sufficiently contemporaneous with the POI, and specific to the input respondents reported that they used to produce silicon metal.

BAS and RTL argue that Egyptian value information is not the best information for valuing the factors of production in this investigation because it does not reflect the market forces at work in the Russian market economy. BAS and RTL contend that the new Egyptian factor value is more specifically applicable to the petroleum coke used in silicon metal production and less aberrational than the surrogate coke value used in the Preliminary Determination. BAS and RTL notes that this new Egyptian value is over six times the published prices for petroleum coke in the nearby Mediterranean market. BAS and RTL explain that the Russian market prices for petroleum coke are consistent with the published Mediterranean market price. BAS and RTL argue, therefore, that the Egyptian value for petroleum coke is aberrational because of the large disparity between the Egyptian value and the actual

Russian market economy prices for petroleum coke. Thus, BAS and RTL contend the Department should use the Russian market economy coke price or a Mediterranean market value in its final determination.

**Department's Position:** We agree with petitioners. For the final determination we used the 1999 United Nations Statistical Division Commodity Trade Database System ("UNCTS") Egyptian import value for petroleum coke under HTS #2713, "petroleum coke, petroleum bitumen & other residues....," deducting those values from countries previously determined by the Department to be non-market economy countries. While we used the 1999 UNCTS data for Egypt under HTS #2704, "retort carbon, coke or semicoke of coal, lignite peat," in the Preliminary Determination, we agree with petitioners and BAS and RTL that HTS #2713 is more specific to the petroleum coke used by respondents in the production of silicon metal.

We rejected petitioners' suggested Egyptian price information for coke, as discussed Comment 2. We also find that respondents' suggested Mediterranean market value for petroleum coke does not refer to a specific country, and thus we are unable to determine if the surrogate value is from country at a level of economic development comparable to Russia. Therefore, we find that the Mediterranean market value for petroleum coke is not appropriate. Moreover, we have a useable Egyptian import value for petroleum coke, which we used for the final determination.

Furthermore, as discussed in Comment 1, we find that it is not appropriate to use Russian market economy prices as a "benchmark" of potential surrogate values' reliability. Thus, we are not examining the Russian coke value as a comparison to the Egyptian coke value used in the Preliminary Determination.

#### **Comment 5: Valuation of Wood Charcoal**

Petitioners argue that the Department should use the price for imported charcoal in Egypt from EFACO, an Egyptian ferrosilicon producer, rather than the Thai import value it used in the Preliminary Determination. Petitioners contend that the Department's established practice is to use the surrogate values from a single country to the greatest extent possible, and surrogate values from a country that is both economically comparable and a significant producer of comparable merchandise. Petitioners argue that while Thailand is comparable to Russia in terms of per capita GDP, it does not produce silicon metal or any other ferroalloy product, and therefore, the Department should use the Egyptian charcoal price.

Kremny/SKU and Pultwen contend that the source information and reliability of the price information for charcoal in Egypt is suspect, as discussed above in Comment 2, and should not be used for the final determination.

BAS and RTL argue that the Egyptian price information for charcoal is aberrationally high in

comparison to the other charcoal values on the record. BAS and RTL note that the Thai surrogate import value for charcoal used in the Preliminary Determination, \$49.57 per MT, and a more recent Thai surrogate import value for charcoal on the record, \$46.14 per MT, are lower than the Egyptian price for charcoal, \$97 per MT. Thus, BAS and RTL contend that the Department should use the 2001 Thai import charcoal value for the final determination because it is reliable and contemporaneous with the POI.

**Department's Position:** We agree with respondents, in part. For the final determination we used the more recent 2001 Thai import value for wood charcoal from the Thai Customs Department 2001 Import Statistics. We find that this value is more contemporaneous than the 1999 Thai import value for wood charcoal we used in the Preliminary Determination. As discussed in the Factors Valuation Memo, we were unable to locate a usable Egyptian value for wood charcoal, as Egypt had aberrationally low import quantities of only 24 MT in 1998 and 36 MT in 1999, according to the UNCTS import statistics for wood charcoal. See Factors Valuation Memo, at pages 8-9. We also found that only Thailand had a significant quantity of imports of wood charcoal as Colombia, the Philippines, and Tunisia had very low quantities of imports in 2000, of 2 MT, 477 MT, and 39 MT, respectively. See id. We noted that Tunisia had a moderate level of imports of 2,991 MT in 1999, but had an aberrationally high unit value of \$550.60/MT, more than ten times larger than the Thai unit value. See id. Therefore, we determined that the Thai value for wood charcoal was the most appropriate value for valuing respondents' wood charcoal input.

With respect to petitioners' argument that Thailand does not produce comparable merchandise, as discussed above, Thailand appears to refine primary and secondary metal. Additionally, Thailand produces steel, which petitioners implicitly agree is comparable merchandise as they proposed an Egyptian producer of steel, Alexandria National Iron & Steel Co. ("Alexandria"), as a surrogate for profit. Furthermore, the Department used Alexandria as a surrogate in an investigation of silicomanganese, which is comparable to silicon metal. See Silicomanganese from Kazakhstan. We are rejecting petitioners' proposed Egyptian price information for wood charcoal, as discussed Comment 2. Additionally, no other potential surrogate values for wood charcoal have been placed on the record since the Preliminary Determination.

#### **Comment 6: Valuation of Electrodes**

Kremny/SKU and Pultwen argue that the Department should apply a market economy price to all electrodes they used in the production of silicon metal. Kremny/SKU and Pultwen explain that the Department in the Preliminary Determination applied the market economy price only to electrodes with a certain diameter, which was the same size purchased by Kremny/SKU from their market economy supplier. Kremny/SKU and Pultwen explain that in the Preliminary Determination the Department applied a surrogate value based on the 1999 UNCTS data for Egypt for "carbon electrodes and brushes, lamp carbons, etc.," to all other sizes of electrodes. Kremny/SKU and Pultwen contend that the UNCTS data category used by the Department does not differentiate by diameter, and therefore,

electrodes above or below a certain diameter are not placed into an alternate product category. Thus, Kremny/SKU and Pultwen argue that the market economy price for electrodes purchased by Kremny/SKU and Pultwen should be applied to all electrodes consumed during the POI, regardless of diameter.

Petitioners contend that Kremny identified different types of electrodes consumed in the production of subject merchandise and reported separate per-unit consumption rates for each. Petitioners contend that the electrodes in question are clearly not identical and Kremny, SKU and Pultwen did not treat them as identical in reporting Kremny's factors of production. Thus, petitioners argue the Department correctly valued the electrodes purchased from a market economy supplier using the market economy price and valued the other types of electrodes using an appropriate Egyptian import value for electrodes.

BAS and RTL contend that if the Department classifies electrodes as a direct material input for the final determination, then it should not use the aberrational Egyptian electrode value, but rather the Russian market economy price of electrodes identified in the Department's Factors Valuation Memo. See Factors Valuation Memo. BAS and RTL explain that this market price for electrodes used in the production of silicon metal establishes the appropriate market valuation of electrodes of all diameters used in the production of silicon metal. Furthermore, BAS and RTL argue that if the Department determines it cannot use the Russian market price to value all electrodes, the surrogate value of electrodes from the Philippines is appropriate.

Petitioners argue that the Philippines is not a producer of comparable merchandise and thus is not a suitable surrogate country for Russia in this investigation. Additionally, petitioners argue that BAS and RTL have provided no basis for using the Philippine data in favor of the Egyptian import data.

**Department's Position:** We agree with petitioners, in part. For the final determination we have continued to use a 1999 UNCTS Egyptian import value for electrodes to value other sizes of electrodes not purchased from a market economy by Kremny/SKU and for all of BAS's electrode usage. We disagree with Kremny/SKU and Pultwen that we should use the market economy price to value all electrodes. Kremny/SKU and Pultwen reported different usage rates for various sizes of electrodes in its June 19, 2002, Section D response and subsequent responses. See Kremny/SKU and Pultwen's June 19, 2002, Section D questionnaire response, at Exhibits 9 and 10. Kremny/SKU and Pultwen also recorded its usage of each size of electrode separately. See id. Moreover, the electrodes' material is different according to Kremny/SKU and Pultwen's description of its raw materials. See id., at Exhibits 13 and 14. The HTS category includes a broader category of electrodes than the market economy purchases (which were specific as to the type and material). As no other appropriate surrogate value from Egypt has been submitted on the record, the broader surrogate value category is more likely to be reflective of the value of the non-market economy-sourced electrodes than the market price proposed by Kremny/SKU and Pultwen. Thus, we have continued to value the size of electrodes purchased by Kremny/SKU from a market economy country using the market economy price and

value the other sizes of electrodes for Kremny/SKU using the Egyptian import value.

We also disagree with BAS and RTL that it is appropriate to value BAS's usage of electrodes using the market economy price paid by Kremny/SKU for certain electrodes. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a NME supplier, "the Secretary normally will value the factor using the price paid to the market economy supplier." In other words, the Department applies 19 C.F.R. §351.408(c)(1) on a respondent-specific basis. Because BAS did not purchase electrodes from a market economy supplier, we have not valued BAS's electrode usage using market economy prices paid by another respondent. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China, 67 FR 36750 (May 24, 2002) ("Welded Pipe from the PRC") and accompanying Issues and Decision Memorandum, at Comment 2. In this case, the best information available for calculating the surrogate value for electrodes is the Egyptian import value, as discussed above. We find that the Egyptian import value is more appropriate than the Philippine value, because Egypt was selected as our primary surrogate country, has useable data, and there is no record evidence that the Philippines produces comparable merchandise. Therefore, since we were able to locate a surrogate value from Egypt that is publicly available, sufficiently contemporaneous, specific to the input in question, and sufficiently reliable, we used the Egyptian import value for the final determination to value BAS's electrode usage and certain sizes of Kremny/SKU's electrode usage not purchased from a market economy supplier.

#### **Comment 7: Valuation of Rail Freight**

BAS and RTL argue that the Department's margin calculation in the Preliminary Determination is distorted by the selection of an Egyptian surrogate value for freight. BAS and RTL contend that the Egyptian rail freight prices represent short routes that overestimate the per-kilometer cost of rail transport in Russia. BAS and RTL argue that the Russian market economy rail freight value shows that great distances of rail routes in Russia lead to a relatively low per-kilometer rail freight cost. Additionally, BAS and RTL contend that Egypt's transportation system is heavily dependent on the use of the Nile River. BAS and RTL state that the surrogate value for rail freight used in the Preliminary Determination is two and a half times the actual market economy cost of rail freight in Russia (\$0.019/MT km and \$0.0077/MT km, respectively). BAS and RTL contend that if the Department does not use the actual market economy rail freight cost in Russia as the surrogate value it should select the Thai rail freight value as the appropriate surrogate, because it is more consistent with the actual Russian rail freight cost the Egyptian value. Furthermore, the Thai rail freight value is more contemporaneous than the Egyptian value with the POI and is more representative of longer routes than the Egyptian value.

Petitioners argue that the Department should not use prices in Russia in this case either to directly value transportation or to use to judge the reliability of the Egyptian rail freight rate, as discussed above in Comment 1. Petitioners also explain that Thailand does not produce a comparable ferroalloy product,

and thus the Department should not use the surrogate prices from Thailand. Petitioners argue that the record shows that the Thai rate is aberrational. Petitioners explain that the South African rail rate is \$0.0191 per km per MT and comparable to the Egyptian rail freight rate of \$0.0196 per km per MT used in the Preliminary Determination. Petitioners note that the Thai freight rate is also far different from these rates and Polish and Tunisian rail rates on the record. Thus, petitioners contend that the Department should continue to use the Egyptian rail rate for the final determination.

**Department's Position:** We agree with petitioners. BAS and RTL provided no evidence that the Egyptian rail rate we used in the Preliminary Determination is aberrational. We have used this rail rate in several non-market economy cases.<sup>2</sup> Additionally, we used a rail rate representative of longer distances, by using the fee/km for a distance of 884 km, rather than an average of all distances in Egypt's rail rates in the Preliminary Determination. The Egyptian rail rate is also comparable to the South African rail rate submitted by respondents. While there is a Thai rail rate on the record, since we have a useable rail rate from Egypt, our primary surrogate country, we have continued to use this value for the final determination.

Moreover, as discussed in Comment 1, we find that it is not appropriate to use Russian market economy prices as a "benchmark" of potential surrogate values' reliability. Thus, we are not examining the Russian rail freight value as a comparison to the Egyptian rail rate value used in the Preliminary Determination.

### **Comment 8: Valuation of Electricity**

BAS and RTL argue that the Egyptian surrogate value for electricity used in the Preliminary Determination is nearly five times the actual cost of electricity for silicon metal producers in Russia, in the post-market economy determination period. BAS and RTL explain that Russia has abundant energy resources, and therefore, its cost of electricity is much lower than the cost of electricity in Egypt. BAS and RTL contend that the Department should use the actual Russian market economy electricity cost to value this factor of production and avoid an inaccurate calculation of production costs.

Petitioners argue that Egypt has significant energy resources, including the hydroelectric power provided by the Nile river, and does not lack energy resources as alleged by BAS and RTL. Petitioners note that in Silicomanganese from Kazakhstan, the Department compared the Egyptian electricity rate with rates in 37 other countries, and determined that the Egyptian rates were not

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<sup>2</sup> See Silicomanganese from Kazakhstan, Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from Kazakhstan, 66 FR 50397 (October 3, 2001) ("Hot-Rolled Steel from Kazakhstan"), and Titanium Sponge From the Republic of Kazakhstan: Notice of Final Results of Antidumping Duty Administrative Review, 64 FR 66169 (November 24, 1999).

aberrational. See Silicomanganese from Kazakhstan Preliminary Determination. Petitioners contend that the Russian electricity rate is distorted and aberrational. Thus, petitioners argue the Department should continue to use the Egyptian electricity price for the final determination.

**Department's Position:** We agree with petitioners. BAS and RTL have provided no new information since the Preliminary Determination questioning the reliability of the Egyptian electricity price. Furthermore, we agree with petitioners' explanation that the Department found Egyptian rates to be non-aberrational in Silicomanganese from Kazakhstan. Therefore, we have continued to use the Egyptian electricity price used in the Preliminary Determination for the final determination.

Moreover, as discussed in Comment 1, we find that it is not appropriate to use Russian market economy prices as a "benchmark" of potential surrogate values' reliability. Thus, we are not examining the Russian electricity rate value as a comparison to the Egyptian rail rate value used in the Preliminary Determination.

### **Comment 9: Valuation of financial ratios**

Kremny/SKU and Pultwen argue that the financial ratios from Egypt are far less reliable than the 2001 financial ratios from South Africa. Kremny/SKU and Pultwen state that the Egyptian financial information from Sinai Manganese used to calculate factory overhead, SG&A, and profit in the Preliminary Determination is suspect because the financial data was derived from a report that is not publicly available, that is not audited, and that has been rejected on these and other grounds in recent cases. Kremny/SKU and Pultwen explain that in Silicomanganese from Kazakhstan, the Department rejected Sinai Manganese's financial statements because they were deemed incomplete. See Notice of Final Determination of Sales at Less than Fair Value: Silicomanganese from Kazakhstan, 67 FR 15535 (April 2, 2002) ("Silicomanganese from Kazakhstan Final Determination") and accompanying Issues and Decision Memorandum, at Comment 3. Kremny/SKU and Pultwen argue that the Department generally considers the quality, specificity, and contemporaneity of the data and prefers financial statements which are audited and publicly available. Kremny/SKU and Pultwen note that the Egypt Aluminum ("Egypt Al") financial information is more detailed than the Sinai Manganese statement, and is publicly available. Kremny/SKU and Pultwen also note that 1998 financial statements for Alexandria appear to be audited, but are not publicly available, and are not contemporaneous with the POI. Kremny/SKU and Pultwen argue that Alexandria does not produce ferroalloys, but rather steel rebar and wire rod, which are much less comparable to silicon metal than vanadium, which is produced by Highveld Steel and Vanadium Corporation Limited ("Highveld") of South Africa, and aluminum, which is produced by Egypt Al. Kremny/SKU and Pultwen explain that silicon metal, unlike steel, is a nonferrous metal, as are both vanadium and aluminum. Kremny/SKU and Pultwen contend that the Highveld financial data from South Africa on the record is complete, comprehensive, annotated financial data, accompanied by an auditor's opinion, which is publicly available and contemporaneous for the POI. Kremny/SKU and Pultwen also note that Highveld is a producer of comparable merchandise, vanadium. Kremny/SKU and Pultwen argue that even if the Department continues to use Egypt as its

primary surrogate country, it should use the Highveld financial data.

BAS and RTL contend that the Department relied on possibly incomplete and un-audited financial information of Sinai Manganese to estimate financial costs in the Preliminary Determination. BAS and RTL note that in Silicomanganese from Kazakhstan, the Department determined that the financial information of Sinai Manganese is not reliable for the purpose of calculating surrogate financial ratios. See Silicomanganese from Kazakhstan Final Determination. BAS and RTL contend that the nature of Sinai Manganese's financial information has not changed, and therefore, it is not appropriate for the Department to use in the final determination. BAS and RTL argue that the Department should use the complete, audited 2001 annual report of Highveld, because it is audited, complete, and contemporaneous with the POI. Additionally, BAS and RTL note that Highveld is a producer of ferrosilicon, silicomanganese, and other ferroalloys. BAS and RTL also argue that if the Department determines to rely on financial information of an Egyptian company, then it should use the 2000 financial information of Egypt Al, which reflects profitable operations and more contemporaneous with the POI than Sinai Manganese. BAS and RTL explain that Egypt Al is a producer of aluminum, which is also a primary product of BAS.

Petitioners contend that the Department did not use Sinai Manganese data in Silicomanganese from Kazakhstan, only because petitioners were unable to provide the complete original source documents for the Sinai Manganese data in a timely fashion for the final determination. See Silicomanganese from Kazakhstan Final Determination. Petitioners explain that, in this investigation, there are 29 pages of detailed, complete, original source documents for the Sinai Manganese data. Additionally, petitioners note that in the Preliminary Determination, the Department stated that "Respondents have not demonstrated that the financial data from Sinai {Manganese} is in fact unreliable." Petitioners contend that neither respondents have presented new arguments since the Preliminary Determination.

Petitioners contend that the South African Highveld statements are not appropriate for this investigation because South Africa is not economically comparable to Russia. Petitioners note that the Department has an established practice of using surrogate data from a single country to the greatest extent possible. Petitioners argue that the Highveld statements are not sufficiently detailed to be used to calculate fully inclusive factory overhead and SG&A expense ratios. Petitioners explain that the components of SG&A expenses reported in the Highveld statements consist of only amounts paid to directors and auditors, research and development costs, certain limited fees comprised of technical and administration etc., and net charge from subsidiaries. Petitioners note that amounts for selling or marketing expenses are not separately reported, and that all other labor costs are collectively reported. Petitioners contend that the Department would only be capturing a portion of Highveld's SG&A expenses. Furthermore, petitioners explain that certain expenses, which are more appropriately considered SG&A but are included in the manufacturing costs, understate Highveld's factory overhead expenses. Petitioners contend that respondents tried to correct these problems by mixing data from Highveld financial statements with data for Highveld reported in a different currency from another source, Hoovers. Petitioners argue that the Department should not use data mixed from different sources. Additionally,

petitioners note that the recalculation of Highveld's expense ratios leads to a loss for 2001, while the audited financial statements for 2001, showed a 3.3 percent profit rate according to the original calculation. Petitioners also argue that the Department in SSB from Russia in determining that the Highveld statements were not useable for calculating factory overhead, SG&A expense and profit ratios stated that "we cannot rely on Highveld Steel's financial statements because it is unclear which elements of Highveld Steel's financial statement constitute SG&A costs." See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From the Russian Federation, 66 FR 67217 (December 28, 2001) ("SSB from Russia").

Petitioners argue that the Department should not use the Egypt Al financial statements because aluminum is not comparable to silicon metal. Petitioners explain that aluminum is produced using an electrolytic production process that does not use a furnace or involve high temperatures as silicon metal does. Petitioners explain that in NME cases, the Department determines the most comparable product to the subject merchandise based on similarities in production factors including physical and non-physical and factor intensities. See Policy Memo. Petitioners contend that silicon metal and aluminum are produced using two distinct processes, and therefore, the factors of production and factor intensities are different. Thus, petitioners contend that silicon metal and aluminum cannot be considered comparable products for purposes of selecting surrogate values. Petitioners note that Sinai Manganese produces ferromanganese, a ferroalloy that is produced using nearly identical equipment and many common production inputs including quartzite, carbonaceous reducing agents and carbon electrodes. Thus, petitioners argue that the Department should continue to use the 1999-2000 Sinai Manganese data to value factory overhead and SG&A expenses for the final determination.

**Department's Position:** In the Preliminary Determination, we used the 1999-2000 Sinai Manganese financial information to value factory overhead, and SG&A, including interest expenses. We note that for the Preliminary Determination and the Initiation, Sinai Manganese was the only Egyptian company's financial data on the record. We also had financial data from Highveld, a South African producer of vanadium, on the record at the time of the Preliminary Determination, however, South Africa is not at a comparable level of economic development to Russia, and thus we disregarded Highveld's financial data. For the final determination we have four companies' financial data on the record: Sinai Manganese, an Egyptian producer of ferromanganese; Highveld, a South African producer of vanadium; Egypt Al, an Egyptian producer of aluminum; and Alexandria, an Egyptian producer of steel.

First, we have useable financial information on the record from Egypt, our primary surrogate country. Thus, we are disregarding the Highveld financial data. Second, we now have two profitable Egyptian companies on the record, and thus, we are disregarding Sinai Manganese for a number of reasons. To begin, it experienced a negative profit in 1999-2000, and 1998-1999. We have in past non-market economy cases rejected using financial information from companies with a negative or zero profit in

favor of profitable companies.<sup>3</sup> We also do prefer not to “mix and match” financial ratios from different companies. In Persulfates from the PRC, we recognized that “{a} company's profit amount is a function of its total expenses.” Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review 64 FR 69494 (December 13, 1999) (“Persulfates from the PRC”). A company’s profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company. We also note that while we have financial data for Sinai Manganese for 1995-1998 on the record, petitioners have only provided source and supporting documentation for Sinai Manganese’s financial data in 1998-1999 and 1999-2000. The 1995-1998 Sinai Manganese financial data may be incomplete, and moreover is not contemporaneous with the POI. Thus, we are disregarding all Sinai Manganese financial data as either having a negative profit or incomplete and not contemporaneous financial data.

Next, we have two profitable Egyptian companies’ financial data on the record, that are audited and publicly available. We disagree with BAS and RTL that Alexandria is not publicly available because the Alexandria financial information was submitted as public information. See Persulfates from the PRC. Furthermore, the same Alexandria financial information has been used in past antidumping investigations, so it has been on the public record of previous proceedings. See Silicomanganese from Kazakhstan, Hot-Rolled Steel from Kazakhstan, and Hot-Rolled Steel from Romania. However, we do not have sufficient evidence on the record to distinguish whether the financial data of an aluminum producer or of a steel producer is more suitable for valuing the financial ratios. Thus, we examined the contemporaneity of the two companies’ data. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod From Ukraine, 67 FR 17367 (April 10, 2002). Egypt Al’s financial data is more contemporaneous with the POI than Alexandria is because it represents July 1999 through July 2000, while Alexandria represents 1998 financial data. Therefore, for the final determination we valued overhead, SG&A and profit using Egypt Al’s financial ratios because it is the best information available. Egypt Al is a producer of aluminum, which has an electricity-intensive production process similar to silicon metal. Therefore, we have also determined that Egypt Al is a producer of comparable

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<sup>3</sup> See Statement of Administrative Action, H.R. Doc. 316, Vol. 1, 103-807 at 839; Redetermination Pursuant to Court Remand in Rhodia, Inc. v. United States, Court No. 00-08-00407 (March 29, 2002) (“Rhodia v. United States”); Tapered Roller Bearings and Parts thereof, Finished and Unfinished, from the People’s Republic of China, Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68,990 (November 14, 2002) (“TRB from the PRC 2000-2001”) and accompanying Issues and Decision Memorandum, at Comment 5. See also Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From the People’s Republic of China, 66 FR 33,522 (June 22, 2001) (“Steel Concrete Rebar from the PRC”) and accompanying Issues and Decision Memorandum, at Comment 8; Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from Moldova, 66 FR 33,525 (June 22, 2001) (“Steel Rebars from Moldova”) and accompanying Issues and Decision Memorandum, at Comment 3.

merchandise for purposes of the statute.

While we have found Egypt Al's financial data the best information available for valuing the financial data, we disagree with respondents that we should use Egypt Al's financial data because Egypt Al is a producer of aluminum, which respondents also produce. The Department does not tailor the factory overhead and SG&A expenses of a surrogate company to match the experience of respondent producers. See Persulfates from the PRC, and accompanying Issues and Decision Memorandum, at Comment 5. The U.S. Court of Appeals upheld in Nation Ford that, although "a surrogate value must be as representative of the situation in the NME country as is feasible," we are not required to "duplicate the exact production experience of the NME producer" at the expense of choosing a surrogate value that most accurately represents the fair market value of the various factors of production in the surrogate country. See Nation Ford Chemical Company v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The Department's non-market economy practice establishes a preference for selecting surrogate value sources that are producers of identical or comparable merchandise, provided that the surrogate data is not distorted or otherwise unreliable. Thus, we are using Egypt Al's financial data for the final determination, because it provides a surrogate profit, is publicly available, and is the most contemporaneous with the POI.

#### **Comment 10: Surrogate financial value for Profit**

Petitioners contend that the Department should include a surrogate financial value for profit. Petitioners explain that the Department's practice for valuing factory overhead, SG&A expenses and profit, is to use data from "producers of comparable merchandise located in a single surrogate country, where possible." See Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium from the Russian Federation, 66 FR 49347 (September 27, 2001) ("Pure Magnesium from Russia") and accompanying Issues and Decision Memorandum, at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 FR 61764 (November 19, 1997). Petitioners argue that according to Section 773(c)(1) of the Act, the Department must include an amount for profit in the normal value. Furthermore, petitioners contend that legislative history in both market economy and non-market economy cases confirms that the Congress intended the Department to use data from profitable sales or profitable companies to determine the profit included in normal value.<sup>4</sup> Additionally, petitioners argue that the Department cited to TRB from the PRC, in support of declining to include a positive amount for profit in normal value in the Preliminary Determination. See 1998-1999 Administrative Review of Tapered Roller Bearing and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results, 66 FR

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<sup>4</sup> Statement of Administrative Action, H.R. Doc. 316, Vol. 1, 103-807 at 839; Redetermination Pursuant to Court Remand in Rhodia, Inc. v. United States; TRB from the PRC 2000-2001, at Comment 5. See also Steel Concrete Rebar from the PRC, at Comment 8; Steel Rebars from Moldova, at Comment 3.

1953 (January 10, 2001) (“TRB from the PRC 1998-1999”). However, petitioners explain that this case has been superseded by the more recent decisions identified above.

Petitioners contend that the Department has in prior non-market economy cases used an alternative source of profit data when the most product-specific financial data available for valuing factory overhead and SG&A expenses did not reflect an amount for profit. Petitioners explain that in Pure Magnesium from the PRC, the Department’s preference for valuing factory overhead, SG&A, and profit is to use a single source, where possible, but that the Department explained that in cases where the selected financial statements do not show a profit for the appropriate period, the Department may use an alternative source for profit, in accordance with its practice.<sup>5</sup> Petitioners explain that in Pure Magnesium from the PRC, the Department used an alternative source for profit because the financial statements used to derive surrogate financial values, reflected a loss for the year. See Pure Magnesium from the PRC. Petitioners state that in that case the Department used a surrogate profit ratio, calculated from the financial statements of Indian aluminum producers, which was found to be comparable to magnesium. Additionally, petitioners note that in Pure Magnesium from the PRC, the Department continued to use more product-specific financial data of an Indian magnesium producer to calculate the factory overhead and SG&A ratios. See id.

Thus, petitioners contend that the Department should use the pre-tax profit reported in the 1996-1997 Sinai Manganese financial data as a surrogate value for profit in the final determination. Petitioners note that there is additional Egyptian data for profit from an Egyptian steel producer on the record, however, the Department should use the 1996-1997 Sinai Manganese financial data, because it is more product-specific.

Kremny/SKU and Pultwen argue that the Department cannot mix-and-match financial statements because companies’ costs, expenses and profit are inextricably interconnected. Kremny/SKU and Pultwen explain that higher costs and expenses generally mean lower profits, while lower costs and expenses generally result in higher profits. Kremny/SKU and Pultwen argue that it would be distortive to mix the high costs and expenses from an unprofitable year with the profit experience from another year where the costs and expenses were lower. Kremny/SKU and Pultwen note that the Department rejected this methodology in the Preliminary Determination, when it stated:

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<sup>5</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular From the People’s Republic of China, 66 FR 49,345 (September 27, 2001) (“Pure Magnesium from the PRC”) and accompanying Issues and Decision Memorandum, at Comment 3. See also Steel Concrete Rebar from the PRC; Persulfates from the People’s Republic of China: Final Results of Antidumping Administrative Review, 66 FR 42,628 (August 14, 2001) and accompanying Issues and Decision Memorandum, at Comment 5; and Silicomanganese from Brazil, Final Results of Antidumping Administrative Review, 62 FR 37,877, 37,878 (July 15, 1997).

the Department finds that using financial data mismatched from more than one year will not accurately reflect the financial costs ratios of a producer of comparable merchandise located in the primary surrogate country. Furthermore, in the final results of the 1998-1999 Administrative Review of Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished from the People's Republic of China, the Department treated any reported negative profits as zero profits in calculating a surrogate profit rate. See Factors Valuation Memo, at page 13.

Kremny/SKU and Pultwen also note that in Pure Magnesium from Russia, the Department stated that:

Because a company's profit is a function of its total expenses, we find that using Billiton's (and the petitioners') factory overhead, while using Zincor's data for SG&A, would result in our applying a profit ratio that would bear little or no relationship to the overhead or SG&A ratios. See Pure Magnesium from Russia, at Comment 1.

Kremny/SKU and Pultwen contend that the Department may review profitability as a criterion when evaluating surrogate financial statements, but only as part of the overall evaluation of the financial statement as a whole. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Steel Concrete Reinforcing Bars from Belarus, 66 FR 8329, 8332 (January 30, 2001) ("Steel Concrete Rebars from Belarus"). Kremny/SKU and Pultwen note that in Steel Concrete Rebars from Belarus, the Department selected the financial statements of a Thai producer of steel products comparable to the subject merchandise, because it could not locate a financial statement of a Thai rebar producer from which the Department could calculate a positive amount of profit. See *id.* Additionally, Kremny/SKU and Pultwen contend that in Steel Concrete Rebars from Belarus, the Department did not attempt to mix and match data from different producers. Kremny/SKU and Pultwen also note that in Pure Magnesium from the PRC, cited by petitioners, where the Department mix-and-matched data from different financial statements, the Department stated that "[its] preference is to value factory overhead, SG&A, and profit using a single source, where possible." See Pure Magnesium from the PRC, at Comment 3.

Kremny/SKU and Pultwen argue that as discussed above (Comment 9), the financial data for Sinai Manganese and Alexandria National are not suitable for valuing financial surrogates for the final determination, and therefore, the Department should use the Highveld data.

BAS and RTL note that the Sinai Manganese financial information for its 1996-1997 fiscal year shows a pre-tax loss of 10,973 thousand Egyptian pounds, and not a profit as alleged by petitioners. BAS and RTL also note that Sinai Manganese received a tax credit for an equal amount to its loss and thus, net profit is zero for the 1996-1997 fiscal year. BAS and RTL note that Sinai Manganese appears to have received similar tax credits for the 1998-1999 and 1999-2000 fiscal years. BAS and RTL contend that the nature of, and reasons for, this tax credit are not explained in the source information on the record for Sinai Manganese. BAS and RTL argue that there is no basis in the Sinai Manganese

financial data for including an additional amount for profit in the final determination.

BAS and RTL contend that the Sinai Manganese financial data is incomplete and unreliable, as discussed above in Comment 9. BAS and RTL also argue that Alexandria Steel is not an appropriate source of profit information, because it does not produce comparable merchandise and does not have comparable production, as discussed above in Comment 9. BAS and RTL contend that the processes, facilities, and operations of an integrated steel mill are not comparable to a silicon metal producer. Additionally, BAS and RTL argue that the financial data for Alexandria Steel is from 1998, and is not contemporaneous with the POI. Thus, BAS and RTL contend that the Department should use the Highveld financial data on the record to value the financial surrogates. BAS and RTL argue that if the Department does not use the Highveld data, it should use the Egypt Al data, because it reflects profitable operations and is more contemporaneous with the POI.

**Department's Position:** We agree with petitioners, in part. As discussed above in Comment 9, we are disregarding Sinai Manganese's financial data. For the final determination we are using Egypt Al's financial data to value factory overhead, SG&A and profit, because it is the best information available for valuing the financial ratios. Since Egypt Al is profitable, this issue is moot.

#### **Comment 11: Silicon Metal Fines**

Petitioners argue that Kremny and BAS improperly included fines in their production quantity, which is used to calculate their reported factors of production. Petitioners explain that customers typically require material no smaller than about 1/4 inch wide at the smallest dimension, or about 6 mm. Petitioners explain that when the silicon metal is crushed and sized, small pieces below commercial-sized silicon metal are unavoidably generated. Petitioners explain that this undersized silicon metal cannot be sold as normal, commercial-sized silicon metal, but at either a very substantial discount or are recycled back into the production process.

Petitioners contend that silicon metal fines are a by-product, as defined in Pure Magnesium from Israel, where the Department discussed the factors that qualify fines as a by-product. See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Israel, 66 FR 49349 (September 27, 2001) ("Pure Magnesium from Israel") and accompanying Issues and Decision Memorandum, at Comment 2. Petitioners explain that in Pure Magnesium from Israel, the Department examines five factors in determining whether a joint product is a by-product or a co-product: (1) whether the product is an unavoidable consequence of producing another product; (2) whether management intentionally controls production of the product; (3) the significance of each product relative to the other products; (4) whether the product requires significant further processing after the split-off point; and (5) how the company records and allocates costs in the ordinary course of business. See id. Petitioners state that silicon metal fines are an unavoidable consequence of producing commercial-sized silicon metal, because the volume of undersized silicon metal generated depends on the amount of silicon metal that is crushed and sized to customer specifications. Petitioners explain that

silicon metal producers do not control the production volume of silicon metal fines. Petitioners also note that the production of fines cannot be characterized as significant in comparison to the production volume of commercial-sized silicon metal. Petitioners argue that fines are sold at a very substantial discount compared to normal-sized silicon metal, as shown by two of Pultwen's sales. Furthermore, petitioners contend that fines that are sold are not further processed. Therefore, petitioners contend, and consistent with another silicon metal antidumping proceeding, Silicon Metal from Brazil, silicon metal fines are a by-product. See Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 62 FR 1954, 1964 (January 4, 1997) ("Silicon Metal from Brazil").

Petitioners argue that is the Department's practice not to allocate costs to by-products. See Pure Magnesium from Israel, at Comment 2; and Silicon Metal from Brazil. Petitioners explain that in Pure Magnesium from Israel, if the by-product is sold, the respondent is entitled to a credit to the cost of manufacture for the net revenue from the by-product sales. See id. Thus, the production quantity must exclude by-products, so as not to improperly allocate costs to the by-product. Petitioners note that the Department instructed the Russian producers to exclude fines from the production quantities used to calculate the factors of production. Furthermore, petitioners contend that the Department's verification exhibit for BAS show that BAS included fines in the production quantity used to calculate its reported factors of production. See BAS's verification report, at Exhibit 5. Petitioners contend that Kremny acknowledged that it included fines in its production quantity used to calculate its factors of production. Petitioners argue that the Department should treat silicon metal fines as a by-product and recalculate the factors of production reported by Kremny and BAS to exclude fines. Additionally, petitioners contend that the quantity of fines sold by BAS during the POI is not on the record. Therefore, petitioners argue that since BAS failed to report the quantity of fines and misrepresented that its reported production quantity used to calculate the factors of production did not include fines, as facts available, the Department should not grant any by-product offset for silicon metal fines for BAS. Petitioners also argue that if the Department does not treat fines as a by-product, it should include the Russian producer's consumption of fines in the factors of production and value the fines using the Department's calculated cost of materials for silicon metal derived from surrogate values for the factors of production. Furthermore, petitioners explain that the Department found at verification of BAS that it adds finished materials to the mold to prevent the molten silicon metal from sticking to the mold. Petitioners contend that fines are used for this purpose; because of their small size, they can be used to line a mold. Thus, petitioners argue that the Department, as facts available, should estimate the volume of fines recycled by BAS, based on the percentage amount of fines recycled by Kremny in relation to total output.

Kremny/SKU and Pultwen contend that the Department did not instruct Kremny to exclude fines from the production quantity used to calculate the factors of production but rather to exclude merchandise that does not qualify as one of Kremny's and SKU's grades of silicon metal were within their standard lump-size ranges for silicon metal. Kremny/SKU and Pultwen note that in the Kremny Verification Report, it states that the company "stopped recording the production of silicon metal sized 0-5 mm separately from the larger sizes of silicon metal because Kremny considers silicon 0-5mm to be a

finished product.” See Kremny Verification Report, at page 14. Kremny/SKU and Pultwen also explain that silicon metal sized 0-5 mm is treated as a finished product for accounting purposes. See id. at Exhibit 15.

Kremny/SKU and Pultwen argue that the Department has several key factors it evaluates to determine if a product is a byproduct or coproduct as discussed in Elemental Sulphur from Canada. See Elemental Sulphur from Canada; Final Results of Antidumping Finding Administrative Review, 61 FR 8239, 8241-8242 (March 4, 1996) (“Elemental Sulphur from Canada”). Kremny/SKU and Pultwen explain that silicon metal fines do not qualify as a byproduct according to Elemental Sulphur from Canada. See id. Kremny/SKU and Pultwen contend that sales of silicon metal sized 0-5 mm is not insignificant, but the sales value of silicon metal sized 0-5 mm is somewhat less than for silicon metal sized 5-150 mm. Kremny/SKU and Pultwen argue that silicon metal fines are not an unavoidable consequence of producing silicon metal, but is the product being produced, silicon metal.

Kremny/SKU and Pultwen explain that in IPSCO, Inc. v. United States, the Court defined byproducts as “secondary products not subject to investigation. See IPSCO, Inc. v. United States, 965 F.2d 1056, 1058 (Fed. Cir. 1992). Thus, Kremny/SKU and Pultwen contend that in this investigation the scope does not limit the product to any particular size range, although petitioners could have specified this in the Petition.

Furthermore, Kremny/SKU and Pultwen contend that petitioners refer to normal-sized silicon metal to describe silicon metal greater than 5 mm in size, but Kremny/SKU and Pultwen explain that a significant U.S. customer requires sizing comparable to a smaller size. Kremny/SKU and Pultwen explain that Kremny performs additional processing, including crushing, in order to meet this customer’s size requirements. Kremny/SKU and Pultwen state that the crushing process which results in different lump-sizes occurs at the end of the production process so there is no processing of any product beyond this state. Finally, Kremny/SKU and Pultwen explain that Kremny separately tracks and records its production and shipments of silicon metal sized 0-5 mm from silicon metal sized 5-150 mm, unlike in Pure Magnesium from Israel, where the Department found that the “lack of record keeping concerning chlorine or sylvanite supports a determination that they are byproducts rather than coproducts.” See Pure Magnesium from Israel, at Comment 3. Kremny/SKU and Pultwen also note that in Silicon Metal from Brazil, cited by petitioners, the Department considered ladle skulls, off-grades, and fines as byproducts, but not slag of silicon metal or ingot bottom, while in this investigation Kremny/SKU and Pultwen reported slag as a byproduct and silicon metal sized 0-5 mm as a final good. See Silicon Metal from Brazil. Thus, Kremny/SKU and Pultwen argue that silicon metal sized 0-5 mm is not a byproduct and Kremny properly reported its production quantity.

BAS and RTL argue that the Department should allocate costs over all saleable qualities of silicon metal, including second-quality silicon metal, consisting of silicon metal sized 0-5 mm. BAS and RTL explain that silicon metal with a size range of 0-5 mm are sold in the home market as second-quality products. BAS and RTL contend that the same manufacturing factors are used to produce all qualities of silicon metal produced by BAS. BAS and RTL contend that silicon metal sized 0-5 mm are sold to

customers in the home market in the same manner as larger sizes and at roughly the same price levels. BAS and RTL argue that in BAS's normal accounting records, BAS allocated costs for silicon metal sized 0-5 mm in the same manner as larger sized products. BAS and RTL contend that in Steel Bar from India and Steel Wire Rod from Canada, the Department allocated costs over all saleable products, including second-quality products. See Notice of Final Determination at Less Than Fair Value: Stainless Steel Bar from India, 59 FR 66915, 66920-66921 (December 28, 1994) ("Steel Bar from India"); Notice of Final Determination at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada, 59 FR 18791, 18797 (April 20, 1994) ("Steel Wire Rod from Canada"). Also, see Ipsco, Inc. v. United States. Thus, BAS and RTL contend that the Department should continue to allocate costs over all saleable qualities of silicon metal, including silicon metal sized 0-5 mm.

**Department's Position:** We agree with respondents that fines should be included in the calculation of the production quantity. Both Russian producers' production of silicon metal fines fall within the scope of this investigation, have the same chemical properties of silicon metal sold in the U.S. market, and are sold as finished products. The scope of this investigation includes all compositions, forms, and sizes of silicon metal, including fines. Additionally, silicon metal fines are small pieces of the parent alloy containing the same chemical composition. Finally, at verification we confirmed that BAS and Kremny included only silicon metal fines that were sold in their calculation of total production of silicon metal during the POI. Similarly, in Silicomanganese from the PRC, we found that "excluding fines from the production quantity used to calculate the reported factors would overstate the factors of production," because: silicomanganese fines are the same chemistry as the parent alloy; the scope of that review included all compositions, forms and sizes of silicomanganese, including fines; and petitioners failed to explain why it considers fines to be non-commercial grade silicomanganese.<sup>6</sup> Silicomanganese is a manganese ferroalloy, which uses many common inputs of silicon metal (including quartz and carbon sources such as charcoal). See Mineral Industry Surveys, Ferroalloys 2000 Annual Review at 28.1, U.S. Geological Survey (December 2001).

Furthermore, the record of this investigation does not support the petitioners' claim that fines are by-products rather than commercial-grade silicon metal. The Russian producers crush the silicon metal slabs to general size ranges specified by the customer. While silicon metal fines are typically generated as a result of this crushing stage, the smaller pieces of silicon metal are then sold and recorded in the Russian producers' accounting records as finished products with other sales of silicon metal. Moreover, because the scope of this investigation does not differentiate between size, form, or composition, silicon metal fines were subject to this investigation and the Department would have

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<sup>6</sup> See Silicomanganese From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 65 FR 31514 (May 18, 2000) ("Silicomanganese from the PRC") and accompanying Issues and Decision Memorandum, at Comment 2 (Part IV. Miscellaneous Issues).

required respondents to report any sales of fines if they had sold them in the U.S. market during the POI.

We disagree with petitioners that fines are an unavoidable consequence of producing commercial-sized silicon metal, but that fines are sold commercially as well. We confirmed at verification of BAS and Kremny that they made sales of 0-5 mm silicon metal. Additionally, in BAS's sales invoices for 0-5 mm silicon metal, they show that the 0-5 mm silicon metal falls under BAS's commercial grades. See Memorandum from James C. Doyle, Program Manager, and Cheryl Werner, Case Analyst, to the File: Verification of Factors of Production for Bratsk Aluminum Smelter ("BAS") in the Antidumping Duty Investigation of Silicon Metal from the Russian Federation, at Exhibit 10 (December 5, 2002) ("BAS Verification Report"). Additionally, the prices at which BAS sold silicon metal fines show that they are not sold at a "very substantial discount" compared to normal-sized silicon metal. Due to the proprietary nature of the price, please see BAS and RTL Final Analysis Memo. Furthermore, the production of fines is not insignificant when compared to the production of other sizes of silicon metal.

In Silicon Metal from Brazil, the Department found that silicon metal production costs should be allocated to only commercial-grade silicon metal. In this case, silicon metal fines are commercially-sold at near the prices of larger sizes of silicon metal and are recorded in the Russian producers' accounting records as finished products. Therefore, we have not recalculated the factors of production as suggested by petitioners.

#### **Comment 12: Unreported Raw Materials**

Petitioners argue that the Department discovered at verification that Kremny did not report its per-unit consumption of certain materials. Petitioners contend that, despite Kremny's explanation that these materials are auxiliary materials and their usage is not recorded in any records maintained by Kremny, these materials are recorded by Kremny in its production records. See Kremny Verification Report, at Exhibit 12. Petitioners also argue that, even if the materials are considered by the Department to constitute auxiliary materials which are captured in factory overhead, the Department did not include any amount for indirect or auxiliary materials in the calculation of the factory overhead rate in the Preliminary Determination. Petitioners explain that the factory overhead cost derived from Sinai Manganese's financial statements in the Preliminary Determination is for depreciation.

Petitioners state that according to Section 773(c)(1)(B) of the Act, the Department must include surrogate-valued amounts for all quantities of raw materials employed in calculating the normal value. Petitioners explain that in Silicomanganese from Kazakhstan, the Department obtained usage rates for certain auxiliary materials including fireproof clay and brick chamotte and valued the consumption of these inputs using surrogate values for the materials. See Silicomanganese from Kazakhstan Preliminary Determination. Petitioners also explain that in Silicomanganese from Kazakhstan, the Department stated that "we are valuing {these materials} directly because we have no overhead surrogate figure that would normally include these indirect items." See id. Therefore, petitioners contend the

Department should directly value Kremny's previously unreported materials. Petitioners explain that the Department should calculate the per-unit consumption of each material for the POI, from Kremny's "Movement in Accordance with Balance Accounts" records, and value using Egyptian import values as surrogates.

Kremny/SKU and Pultwen argue that although the Department noted in its verification report that Kremny did not report their usage of certain materials, Kremny/SKU and Pultwen explain that these materials were not included in the factors of production because they are considered by Kremny to be auxiliary materials. Kremny/SKU and Pultwen explain that these materials are used only intermittently, as required in a particular ladle of silicon metal, and are not included in any of Kremny's technical reports, which identify production factors such as quartzite, coal, charcoal, petroleum coke, wood, and electrodes. Kremny/SKU and Pultwen contend that the total quantity of these materials consumed during the POI was insignificant and they argue that the Department confirmed during verification the accuracy and completeness of the data submitted by Kremny and noted "no discrepancies" on several instances.

Kremny/SKU and Pultwen argue that other materials identified by petitioners are indirect materials properly accounted for in factory overhead. Kremny/SKU and Pultwen contend that unlike financial statements for Sinai Manganese, which only identify depreciation in factory overhead, the Highveld financial data and the Egypt Al financial data report depreciation, cost of goods sold and fixed assets as factory overhead. Kremny/SKU and Pultwen contend that the production of vanadium and aluminum is comparable to the process of producing silicon metal, including using furnaces heated to high temperatures, therefore, the financial data for factory overhead should include related auxiliary materials. Kremny/SKU and Pultwen argue that if the Department uses the Highveld or Egypt Al financial statements, then the overhead rate would be one that normally includes such indirect items, and Kremny's auxiliary materials would be properly accounted for in the factory overhead figure.

**Department's Position:** We agree with petitioners that the Department must include surrogate-valued amounts for all quantities of raw materials used in calculating normal value. At verification, the Department noted that certain raw materials were being used in the production process that had not been reported to the Department along with the usage rates of other raw materials. See Kremny Verification Report, at 11. We disagree, in part, with Kremny/SKU and Pultwen that the certain unreported raw materials are auxiliary, and therefore, should be considered in factory overhead. Due to the proprietary nature of this issue, for further discussion please see Kremny/SKU and Pultwen Final Analysis Memo. Moreover, the amount of all these materials used was not insignificant, but was a necessary input into producing the desired finished product.

We agree with Kremny/SKU and Pultwen that some of the certain raw materials would normally be treated as indirect materials, but we are valuing them directly because we have no appropriate factory overhead surrogate figure that would normally include these indirect items. See Silicomanganese from Kazakhstan Preliminary Determination. Also, see Kremny/SKU and Pultwen Final Analysis Memo.

While we agree with Kremny/SKU and Pultwen that a factory overhead ratio which includes auxiliary materials would be more appropriate, we note that all the Egyptian financial ratios on the record of this investigation represent only depreciation. We disagree with Kremny/SKU and Pultwen that the Egypt Al financial statements include indirect items in its overhead rate. The Egypt Al overhead ratio is derived from the difference between the 1999 and 2000 fixed assets. The Egypt Al financial data gives no indication that indirect items would be included in fixed assets. Furthermore, as discussed above, South Africa is not economically comparable to Russia, and thus we did not consider the Highveld financial data as a surrogate value for financial ratios. See Comment 9. Thus, since we are using Egypt Al's financial data to value factory overhead, and this data does not indicate, that indirect materials are included in the overhead calculation, we directly valued the certain raw materials for the final determination.

The statute requires the Department to use surrogate values for the raw materials used in the production process. See Section 773(c)(1)(B) of the Act. Therefore, the Department valued all raw materials used in the production process of silicon metal, including certain previously unreported raw materials discovered at verification. As Kremny/SKU and Pultwen did not provide data on the record regarding certain raw materials, the Department used adverse facts available to assign a surrogate value for unreported raw materials. As adverse facts available, the Department used the highest surrogate value for a mineral used in the final determination to value certain raw materials. Additionally, as the usage rates for these raw materials have also not been reported by Kremny/SKU and Pultwen to the Department, we calculated a per-unit consumption for each raw material by dividing the total POI consumption of each material, using the monthly totals from the "Movement in Accordance with Balance Accounts," by the production quantity of silicon metal.

### **Comment 13: Date of Sale**

Petitioners contend that according to 19 C.F.R.351.401(i), the Department selects as the date of sale the date that best represents when the price and quantity of the sale are set. Petitioners explain that the Department's preference is to base the date of sale on the date of invoice, however "if the facts of a case indicate a different date better reflects the time at which the material terms of sale were established," the Department will select an alternative date as the date of sale. See Preliminary Determination. Petitioners state that the Department used date of invoice as date of sale for BAS and RTL for the Preliminary Determination, because "a significant percentage of contract quantities of subject merchandise changed" during the POI. See id. Petitioners argue that at verification, the Department discovered that this was not the case. Petitioners explain that RTL made its U.S. sales pursuant to individual customer orders that resulted in sales contracts specifying price and quantity, and an agreed percentage tolerance. Petitioners contend that these individual customer orders were in fact long-term contracts, which is supported by the sales documents. Petitioners explain that the Department examines whether an invoiced quantity consistently falls within the specified delivery tolerance of a contract, when determining whether a contract with a quantity tolerance establishes the quantity terms of sale. See Notice of Final Determination of Antidumping Duty Investigation: Certain

Hot-Rolled Carbon Steel Flat Products from Thailand, 66 FR 49622 (September 28, 2001) (“Hot-Rolled Steel from Thailand”) and accompanying Issues and Decision Memorandum, at Comment 9. Petitioners explain that the Department has found that “any differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale.” See id. Petitioners note that at verification, the Department confirmed that RTL’s invoiced quantity fell within the stated delivery tolerances for its U.S. sales. See BAS Verification Report, at page 6. Thus, petitioners contend that RTL’s sales contracts with U.S. customers establish the material terms of sale, and are the appropriate date of sale for BAS’s U.S. sales.

BAS and RTL contend that the use of the date of invoice as the date of sale is consistent with the Department’s regulations. See 19 C.F.R. 351.401(i). BAS and RTL argue that while the regulations grant the Department discretion to select an alternative date to the invoice date as the date of sale when appropriate, the regulations clearly establish a presumption that the invoice date will be the date of sale in most situations. BAS and RTL argue that according to 19 CFR 351.401(i), “the date of invoice will be the presumptive date of sale under paragraph (i).” BAS and RTL contend that the order quantity and price may be subject to change between the time of the initial order and shipment of the merchandise. BAS and RTL explain that RTL retains the right to modify the quantity and price of the order, and therefore, the material terms of the sale are not fixed until the merchandise is actually shipped. Thus, BAS and RTL argue that the Department should continue to use the invoice date as the date of sale for the final determination.

**Department’s Position:** We agree with petitioners that the contract date is a more appropriate date of sale than the invoice date for RTL’s sales of subject merchandise during the POI. According to 19 CFR 351.401(i), the Department will use that alternative date as the date of sale, if the Department has satisfactory evidence that material terms are established on a date other than the invoice date. In this case, the material terms of the sale are set at the sales contract date because the terms did not change significantly between the contract date and the invoice date. As discussed in the RTL Verification Report, “we noted that none of these sales exceeded the tolerance of the contract.” See RTL Verification Report, at page 6. We also found that unit prices did not change between the contract date and the invoice date. Similarly, we agree with petitioners that in Hot-Rolled Steel from Thailand, we noted that there were several instances when the quantity had changed after the final contract date, but we found such changes to have been “minimal and to have affected a relatively insignificant volume of subject merchandise shipped to the United States.” See Hot-Rolled Steel from Thailand. Thus, in that case, we chose contract date as the date of sale. For the final determination we used RTL’s contract date as the date of sale for the calculation of export price (“EP”) sales.

#### **Comment 14: Pultwen’s Sales to a certain U.S. customer**

Petitioners contend that certain sales reported by Pultwen as EP sales should be classified as CEP sales, according to Section 772(b) of the Act. Petitioners argue that at verification of Pultwen, the

Department obtained information demonstrating that certain U.S. sales were negotiated in the United States, making them CEP sales, and not EP transactions. Due to the proprietary nature of this issue, for further discussion please see the Kremny/SKU and Pultwen Final Analysis Memo.

Petitioners explain that to determine whether U.S. sales involving a U.S. sales representative, agent, or affiliate are properly classified as EP or CEP sales, the Department examines whether the function of the U.S. representative or affiliate is limited to that of a “processor of sales-related documentation” and a “communication link” with the unrelated buyer.<sup>7</sup> Additionally, petitioners argue that in cases where the activities of the U.S. selling agent or affiliate are ancillary to the sale, such as arranging transportation or customs clearance, the Department classifies the U.S. sales as EP. However, petitioners explain that when the U.S. affiliate of selling agent is substantially involved in the sales process, such as negotiating prices, the Department treats the transactions as CEP sales. See id. Therefore, petitioners contend that certain U.S. sales by Pultwen should be considered CEP sales, and the Department should either request Pultwen to provide all the necessary CEP deductions for these sales or apply facts available for these sales.

Kremny/SKU and Pultwen argue that the evidence on the record supports the Department’s treatment of Pultwen’s sales to a certain U.S. customer as EP sales. Kremny/SKU and Pultwen argue that in Carbon Steel Wire Rod from Mexico, a U.S. subsidiary acted as an agent for its German parent, negotiating sales details with U.S. customers, but the Department determined that these were EP sales because the record showed that these sales took place outside the United States. See Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (August 30, 2002) (“Carbon Steel Wire Rod from Mexico”) and accompanying Issues and Decision Memorandum, at Comments 2 through 4. Kremny/SKU and Pultwen explain that in Carbon Steel Wire Rod from Mexico, the Department relied on the principles set forth in AK Steel v. United States, which distinguished EP and CEP sales based on the “locus of the transaction” and who “contracted for sale with the unaffiliated U.S. customers.” See AK Steel v. United States, 226 F.3d 1361, 1371 (Fed. Cir. 2000). Kremny/SKU and Pultwen explain that in AK Steel v. United States, the Court held that the “seller” referred to in the CEP definition is simply one who contracts to sell and “sold” refers to the transfer of ownership or title. See id. Kremny/SKU and Pultwen argue that in Carbon Steel Wire Rod from Mexico, the U.S. subsidiary negotiated the sales, oversaw delivery logistics, and received payments from the customers, but the German parent contracted with the

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<sup>7</sup> See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Dynamic Random Access Memory Semiconductors of One Megabit and Above (DRAMs) from Taiwan, 64 FR 28983, 28988 (May 28, 1999) (“DRAMs from Taiwan”). See also E.I. Du Pont v. United States, 841 FS 1237, 1248-50 (CIT 1993); AK Steel Corp. v. United States, Consolidated Court No. 97-05-00865, 1998 WL 846764, at 6 (CIT 1998); and Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Administrative Review, 62 FR 18389, 18391 (April 15, 1997).

customers. See Carbon Steel Wire Rod from Mexico, at Comment 4.

Thus, Kremny/SKU and Pultwen contend that the Department should treat certain U.S. sales by Pultwen as EP sales because the U.S. customer issues its purchase orders directly to Pultwen, Pultwen issued the Sales Notes (sales contracts) and invoices directly to the U.S. customer, and Pultwen shipped the merchandise directly from Kremny to the U.S. customer. Kremny/SKU and Pultwen explain that the U.S. sales representative performed a liaison function between Kremny and certain of Pultwen's U.S. customers. Kremny/SKU and Pultwen state that the U.S. sales representative also provided technical and logistical support in connection with these U.S. sales. Kremny/SKU and Pultwen contend that the quantity and value of each spot sale to the U.S. customer during the POI did not change, and therefore suggests that there was no price negotiation with this customer. Kremny/SKU and Pultwen contend that Pultwen executed the sales contracts with this U.S. customer and thus they should be classified as EP sales.

**Department's Position:** We agree with Kremny/SKU and Pultwen that these sales to a certain U.S. customer were properly classified as EP sales. Consistent with AK Steel v. United States, we determined that the locus of the transaction took place outside the United States. Due to the proprietary nature of this issue, for further discussion please see Kremny/SKU and Pultwen Final Analysis Memo. The sales in question involved a U.S. sales representative, who performed a liaison function between Kremny/SKU and Pultwen and certain of Pultwen's U.S. customers. We agree with Kremny/SKU and Pultwen that Pultwen, which is not based in the United States, issued all sales documentation including sales contracts, invoices, and shipping documents directly to the U.S. customer. See Memorandum from James C. Doyle, Program Manager, and Cheryl Werner, Case Analyst, to the File: Verification of U.S. Sales for Pultwen Ltd. ("Pultwen") in the Antidumping Duty Investigation of Silicon Metal from the Russian Federation, at Exhibit 11 (December 4, 2002) ("Pultwen Verification Report"). Due to the proprietary nature of this issue, for further discussion please see Kremny/SKU and Pultwen Final Analysis Memo. Furthermore, we agree with respondents that as in Carbon Steel Wire Rod from Mexico, in this case the sale took place outside of the United States at Pultwen's UK-based headquarters, and the U.S. sales representative had a minimal role. Thus, for the final determination we continued to treat these sales as EP sales.

### **Comment 15: Discounts**

Petitioners contend that the Department discovered at verification that Pultwen granted discounts on certain invoices issued to a U.S. customer during the POI. See Pultwen Verification Report, at pages 1 and 7 (December 4, 2002). Petitioners contend that for the final determination, the Department should calculate the per-unit discount for invoices identified in the Pultwen Verification Report as receiving a discount and deduct it from the reported gross unit prices accordingly. See id.

**Department's Position:** The Department agrees with petitioners that the Department should calculate the per-unit discount for invoices identified in the Pultwen Verification Report as receiving a discount

and deduct it from the reported gross unit prices accordingly. At verification, the Department discovered that Pultwen granted discounts on certain invoices issued to a U.S. customer during the POI. According to the Department's regulations U.S. price should be reduced by any discounts granted on U.S. sales of subject merchandise. See 19 C.F.R. § 351.401(c). Therefore, for the final determination, the Department calculated the per-unit discount for invoices identified in the Pultwen Verification Report as receiving a discount and deduct the discount from the reported gross unit prices.

#### **Comment 16: Brokerage and Handling Expenses**

Petitioners argue that according to Section 772(c)(2) of the Act, the Department should deduct the per-unit amount of brokerage and handling expenses, paid in U.S. dollars to a market economy company, for BAS and RTL's U.S. sales.

BAS and RTL argue that if the Department determines it should deduct the actual cost of brokerage and handling from the gross unit price for RTL's U.S. sales, then the Department should use the actual cost of brokerage and handling incurred by RTL.

**Department's Position:** The Department agrees with petitioners that we should deduct the per-unit amount of brokerage and handling expenses, paid in U.S. dollars to a market economy company, for BAS and RTL's U.S. sales. At verification, the Department found that certain brokerage and handling charges were paid in U.S. dollars to a market economy company. See BAS Verification Report a 9. The Department is required by statute to deduct any included costs, charges or expenses from U.S. price that are incurred when moving the subject merchandise from the place of shipment in the exporting country to the place of delivery in the United States. See Section 772(c)(2) of the Act. Therefore, the Department deducted the per-unit amount of brokerage and handling expenses for BAS and RTL's U.S. sales. Additionally, the Department agrees with BAS and RTL that the Department should use the actual cost of brokerage and handling incurred by BAS and RTL in making this deduction. For the final determination the Department will use the actual cost of brokerage and handling incurred by BAS and RTL which was is shown in Exhibit 22 of the RTL Verification Report. See RTL Verification Report at Exhibit 22.

#### **Comment 17: Expenses Related to a Certain Sale**

Petitioners contend that according to Section 772(c)(2) of the Act, the Department should deduct the previously unreported charges for sampling and testing for certain U.S. sales by Pultwen. Petitioners explain that the expenses incurred by Pultwen for sampling and testing were necessary to bringing the merchandise to the United States. Petitioners argue that the Department should calculate the per-unit amount of the sampling and analysis expenses and deduct from the reported gross unit price for the appropriate sales. Additionally, petitioners contend that the Department should deduct an appropriate per-unit surrogate value for Pultwen's brokerage and handling charges incurred for certain U.S. sales, that were paid to a non-market economy supplier.

Kremny/SKU and Pultwen contend that, for the sale in question, the sales documentation shows that Pultwen was unaware of the ultimate destination of the material at the time of the sale. Kremny/SKU and Pultwen explain that the U.S. customer informed Pultwen post-sale that the material was booked on board a vessel destined for the United States. Thus, Kremny/SKU and Pultwen contend that this sale should not be included in the U.S. sales listing used to calculate a margin.

**Department's Position:** We agree with Kremny/SKU and Pultwen that we should not include this sale in the U.S. sales database or our calculation. The Department's practice with respect to making a determination that knowledge of destination existed is that the producer knew or should have known at the time of the sale that the merchandise was being exported to the United States. See e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001) and accompanying Issues and Decision Memorandum, at Comment 3; and Yue Pak, Ltd. v. United States, 20 CIT 495 (1996), affirmed, 111 F.3d 142 (Fed. Cir. 1997).

In this case, we have applied this standard and have not found any evidence indicating that Pultwen knew or should have known that this sale was ultimately destined for the United States at the time the sale was made. At verification, we examined this sale and supporting sales documentation and found no indication of knowledge of the ultimate delivery to the United States at the time the sale was made. See Pultwen Verification Report, at 5. Therefore, we are not including this sale in the U.S. database or in our margin calculation.

Moreover, at the hearing in this case on January 7, 2003, petitioners agreed that this sale should be excluded from the U.S. database. Petitioners stated that "{Kremny/SKU and Pultwen} argue this sale should be excluded from Kremny's US sales database. We have reviewed the record, and we agree with that." See Hearing Transcript. Therefore, since this sale is not to be included in the U.S. database the remaining issues raised by petitioners regarding calculating a per-unit amount for the sampling and analysis expenses and brokerage and handling related to this sale are moot and the Department need not address them.

#### **Comment 18: Relationship between Pultwen and the U.S. trading company**

On August 27, 2002, the Department found Kremny/SKU and Pultwen affiliated with the U.S. trading company by virtue of a principal-agency relationship. See Memorandum For Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III: Antidumping Investigation of Silicon Metal from Russia; Affiliation Memorandum of Pultwen Limited and U.S. Trading Company, dated August 27, 2002 ("Affiliation Memo for Pultwen and U.S. Trading Company").

Kremny/SKU and Pultwen argue the facts on the record of this investigation indicate that no principal-agent relationship exists between Pultwen and the U.S. trading company. Kremny/SKU and Pultwen contend that the Department should further examine the relationship between Pultwen and the U.S.

trading company, and look beyond the parties' characterization of their relationship to determine whether a principal-agent relationship existed. Kremny/SKU and Pultwen argue that the record for this case shows that Kremny/SKU and Pultwen exercise no control over the U.S. trading company's activities with respect to its sales to U.S. customers.

Petitioners contend that the record for this investigation demonstrates that the U.S. trading company acted as an agent for respondents. Petitioners explain that it is the Department's practice to determine a principal-agent relationship when one is established by a written agreement. Additionally, petitioners argue that if the Department does review the nature of the dealings between respondents and the U.S. trading company, it is clear the U.S. trading company was acting on behalf of respondents, as their agent.

Due to the proprietary nature of this issue, please see the Final Affiliation Memo for a full discussion. See Memorandum For Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III: Antidumping Investigation of Silicon Metal from Russia; Final Affiliation Memorandum of Pultwen Limited and U.S. Trading Company, dated February 3, 2003 ("Final Affiliation Memo").

**Department's Position:** We agree with petitioners that the record supports the Department's finding that Pultwen and the U.S. trading company are affiliated, as explained in the Affiliation Memo for Pultwen and U.S. Trading Company and Final Affiliation Memo. Due to the proprietary nature of this issue, for further discussion of the proprietary facts leading to this conclusion please see the Final Affiliation Memo.

#### **Comment 19: Use of Facts Available regarding the U.S. trading company's sales**

Kremny/SKU and Pultwen object to the Department's use of adverse facts available for valuing the portion of Pultwen's sales to the U.S. trading company. In the event the Department continues to find Kremny/SKU and Pultwen affiliated with the U.S. trading company, they propose alternative methods of calculating their margin, which they argue the Department should use in place of assigning adverse facts available to these sales. Kremny/SKU and Pultwen explain that in their July 22, 2002, response they stated that collecting and submitting the U.S. trading company's sales information would impose "a heavy burden on a valued U.S. customer" and the record evidence did not support a finding that the parties were affiliated. Thus, Kremny/SKU and Pultwen explain that they submitted the U.S. trading company's response to the Department's Section A questionnaire but would brief this issue further before asking the U.S. trading company to respond to the Department's Section C questionnaire. Kremny/SKU and Pultwen state that in August 2002, they advised the Department that the U.S. trading company had terminated its commercial relationship with Pultwen Ltd and would not submit its U.S. sales information to the Department. Therefore, Kremny/SKU and Pultwen explain that in their August 27, 2002, response to the Department's request that they submit the sales at issue, they stated that they had made every effort to obtain the requested information and that, despite repeated requests, the U.S. trading company declined to provide it. Kremny/SKU and Pultwen state that on September

13, 2002, they informed the Department that the U.S. trading company had agreed to provide its U.S. sales information. Kremny/SKU and Pultwen explain that they submitted a revised Section C sales database on October 1, 2002, which included the U.S. trading company's sales information, immediately after reconciling with the U.S. trading company. Kremny/SKU and Pultwen contend that this demonstrates that they never stopped acting in good faith to comply with the Department's requests.

Kremny/SKU and Pultwen contend that since they exercise no ownership or control over the U.S. trading company, they could not compel the U.S. trading company's participation. Kremny/SKU and Pultwen explained that once they were able to obtain the requested information from the U.S. trading company, they immediately submitted it to the Department. Kremny/SKU and Pultwen note that the submission was made four months before the scheduled date of the Department's final determination, and therefore, was adequate time for the Department to use the data. Kremny/SKU and Pultwen also note that Kremny/SKU and Pultwen informed the Department that they would be submitting the U.S. trading company's U.S. sales information before the Department signed or announced the Preliminary Determination, and thus were not deciding to cooperate only after being assigned a preliminary margin based on adverse facts available. Kremny/SKU and Pultwen conclude that adverse facts available is unwarranted in this case as they cooperated to the best of their ability in their attempts to first secure, and then supply, the information requested by the Department.

Kremny/SKU and Pultwen contend that if the Department continues to view the absence of downstream sales information for the U.S. trading company's records as a reporting deficiency by Kremny/SKU and Pultwen, the Department should use neutral facts available. Kremny/SKU and Pultwen explain that in SSSS from France and Bicycles from the PRC the Department used neutral facts available, for unreported sales either unreported until verification or discovered at verification, by ignoring the unreported sales in its margin analysis. See Preliminary Results of Antidumping Administrative Review, Stainless Steel Sheet and Strip in Coils From France, 67 FR 51210 (August 7, 2002) ("SSSS from France"); and Notice of Final Determination of Sales at Less than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026 (April 30, 1996) ("Bicycles from the PRC"). Furthermore, Kremny/SKU and Pultwen state that in SRAMs from Taiwan, the Department used the highest non-aberrant margin calculated for any U.S. transaction, to value the unreported U.S. sales discovered at verification. See Static Random Access Memory Semiconductors From Taiwan: Final Results of Antidumping Duty New Shipper Review, 65 FR 12214 (March 8, 2000) ("SRAMs from Taiwan") and accompanying Issues and Decision Memorandum, at Comment 1. Kremny/SKU and Pultwen explain that in SRAMs from Taiwan, the Department sought to value the unreported U.S. sales in a method indicative of the respondent's "customary selling practices" and which is "rationally related to the transactions to which the adverse facts available are being applied." See id. Kremny/SKU and Pultwen also explain that in SSSS from Germany, the Department selected the highest margin on an individual sale in a commercial quantity that fell within the mainstream of respondent's transactions. See Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Germany, 64 FR 30732 (June 8, 1999) ("SSSS from Germany").

Kremny/SKU and Pultwen explain that in SSSS from Germany, the Department stated that “as adverse facts available, we are applying the highest non-aberrational margin calculated based on {respondent’s} correctly reported constructed export price (“CEP”) transactions.” See id.

Alternatively, Kremny/SKU and Pultwen argue that downstream prices can be calculated based on timely-submitted data already on the record contained in their August 27, 2002, response and prior responses, therefore making it unnecessary for assignment of a facts available margin to these sales. Kremny/SKU and Pultwen argue that according to Section 782(e) of the Act, the U.S. trading company’s sales information met the statutory criteria for consideration. First, Kremny/SKU and Pultwen contend that their August 27, 2002, database was submitted in a timely manner, was used by the Department at verification, and contains the prices to the U.S. trading company and all available information on price adjustments. Second, the Department found no significant discrepancies with respect to those reported prices and adjustments at verification. Kremny/SKU and Pultwen note that the Department did not conduct verification of this information at the U.S. trading company but that this option was offered to the Department. Additionally, Kremny/SKU and Pultwen explain that the Department has the authority to limit the scope of its verification and find information verified even if it is not specifically reviewed during an on-site verification. Third, Kremny/SKU and Pultwen argue that they timely reported the prices and quantities of all sales during the POI to the U.S. trading company along with adjustments necessary to reflect the actual or projected net price received by Pultwen. Fourth, Kremny/SKU and Pultwen state that the record shows that they acted to the best of their ability because they provided all available information for this sales information and they explained and documented the U.S. trading company’s unwillingness to provide additional information within the time frame set forth by the Department. Fifth, Kremny/SKU and Pultwen state that the submitted prices and adjustments should present no undue difficulties for the Department to incorporate into its final margin program.

Thus, Kremny/SKU and Pultwen argue that should the Department continue to find that Kremny/SKU and Pultwen failed to act to the best of their ability, the Department should calculate the most accurate margin possible. Kremny/SKU and Pultwen argue the Department should either apply the average margin from other sales, or use the reported adjustments to calculate the downstream prices charged by the U.S. trading company.

Petitioners contend that the Department properly applied adverse facts available to Pultwen’s sales to the U.S. trading company. Petitioners argue that the Department clearly required Kremny/SKU and Pultwen to report the U.S. sales made by the U.S. trading company, however Kremny/SKU and Pultwen failed on five separate occasions to provide the requested data within the deadlines established by the Department. Petitioners argue that according to Section 782(d) of the Act, Kremny/SKU and Pultwen failed to meet all of the requirements established by the Department because: they failed to submit the U.S. trading company’s sales data by any of the five established deadlines; the information they submitted was incomplete and contained fundamental deficiencies; and they failed to act to the best of their ability. Petitioners explain that Kremny/SKU and Pultwen failed to act to the best of their ability

because they significantly impeded this proceeding by delaying the submission of the data by over five months.

Petitioners contend that Section 782(c)(1) of the Act is not appropriate for this case because it concerns the situation where an interested party is unable to provide data “in the requested form and manner” and has “suggested alternative forms in which such party is able to submit the information.” Petitioners note that Section 782(d) of the Act provides that the Department will inform the party submitting the response of deficiencies, and, to the extent practicable, provide that party the opportunity to remedy the deficiencies. Petitioners explain that the Department issued four requests for the U.S. trading company’s sales, allowing Kremny/SKU and Pultwen several opportunities to provide the U.S. trading company’s sales data prior to the Preliminary Determination. Therefore, petitioners argue that according to Section 782(d) of the Act, the Department is fully authorized, and should, resort to facts available to determine the margin for the U.S. trading company’s sales.

Petitioners argue that in the cases cited by Kremny/SKU and Pultwen in support of the Department using neutral facts available for valuing the U.S. trading company’s sales, the Department did not apply neutral facts available. See SRAMs from Taiwan and SSSS from Germany. Petitioners explain that in SRAMs from Taiwan and SSSS from Germany, the Department used the “highest non-aberrant margin” calculated to determine the margin for the sales in question. Petitioners contend that the Department recognized that using neutral or non-adverse facts available would not encourage respondents to provide complete and accurate information. See SRAMs from Taiwan. Petitioners explain that in SRAMs from Taiwan, the Department stated that “in selecting a facts available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner.” See id. Petitioners argue that using neutral data as facts available would improperly reward respondents for failing to provide the necessary data and may encourage them not to provide the Department with adverse information, in the expectation of the Department using neutral data.

Additionally, petitioners note that the sales in question in the cases cited by Kremny/SKU and Pultwen, represent relatively small reporting failures discovered at verification. See SSSS from France, SSSS from Germany, Bicycles from the PRC, SRAMs from Taiwan. Petitioners explain that: in SSSS from France, the total volume of unreported sales constituted less than one percent of total home market sales; in SSSS from Germany, the case involved a small number of U.S. sales identified at verification; in Bicycles from the PRC, the Department noted the sales would have no effect, or a negligible effect on the margin; and in SRAMs from Taiwan, there was no indication that a significant volume of U.S. sales were discovered at verification. See id. Petitioners argue that this is not the case for Kremny/SKU’s and Pultwen’s unreported sales. Petitioners also explain that Kremny/SKU’s and Pultwen’s unreported sales were not discovered at verification but requested five times prior to the Preliminary Determination. Petitioners contend that in cases where the respondent fails to report a substantial portion of its U.S. sales as in this investigation, the Department normally uses total adverse

facts available. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from South Africa, 66 FR 37002 (July 16, 2001) (“Hot-Rolled Steel from South Africa”) and accompanying Issues and Decision Memorandum, at Part III. Also, see Heavy Forged Hand Tools From the People’s Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 48026 (September 17, 2001).

Petitioners contend that application of adverse facts available is fully warranted in this case because Kremny/SKU and Pultwen failed to act to the best of their ability to comply with Department’s requests for the U.S. trading company’s data. Petitioners state that Kremny/SKU and Pultwen were obliged to provide the U.S. trading company’s data from the date of the original questionnaire, on April 23, 2002. Due to the proprietary nature of this issue, for further discussion please see Kremny/SKU and Pultwen Final Analysis Memo.

Petitioners also argue that the Department cannot use the data submitted by Kremny/SKU and Pultwen to determine the margin for the U.S. trading company’s sales. Petitioners contend that according to Section 772(a) through (d), the Department must calculate the U.S. price based on the starting prices paid by unaffiliated purchasers, as adjusted. Petitioners note that sales between affiliated parties cannot be used as the basis for U.S. price. Petitioners argue that using the limited substitute information provided by Kremny/SKU and Pultwen to reasonably approximate the actual sales price and expenses would be improper according to the statute. Furthermore, petitioners argue that the Department does not have the relevant sales information for the POI, because Kremny/SKU and Pultwen have provided prices and quantities to the U.S. trading company based on the date of invoice issued to the U.S. trading company or the date of shipment to the U.S. trading company during the POI, and not the starting prices and quantities for the sales made by the U.S. trading company during the POI based on the proper date of sale. Petitioners also contend that the billing adjustment fields also do not reflect the relevant expenses because they do not represent expenses incurred for the sales made by the U.S. trading company during the POI. Petitioners note that Kremny/SKU and Pultwen stated in their case brief that the amounts listed in the billing adjustment fields are a “projected net adjustment based on the average adjustment for sales that had actually been resold.”

Petitioners contend that the U.S. trading company’s sales are CEP sales, as the Department recognized in its July 3, 2002 questionnaire requesting Kremny/SKU and Pultwen report all CEP deductions for the U.S. trading company’s sales. Petitioners argue that the information on the record does not accurately reflect the amount of CEP deductions, as required by the Department’s practice. Thus, petitioners contend that the Department properly used facts available to determine the margin for the U.S. trading company’s sales and properly used the highest calculated margin in the investigation to determine the margin for these sales.

**Department’s Position:** We agree with petitioners that we properly applied adverse facts available to Pultwen’s sales to the U.S. trading company. The Department’s application of adverse facts available

to Pultwen's sales to the U.S. trading company is supported by substantial evidence on the record, and is otherwise in accordance with Section 782(d) of the Act. We find that Kremny/SKU and Pultwen failed to provide the U.S. trading company's U.S. sales data in a timely manner after several requests by the Department, and failed to cooperate to the best of its ability in this investigation, as discussed below. The Department required Pultwen to provide downstream sales data from the U.S. trading company after Commerce determined that the U.S. trading company was affiliated with Pultwen. See Comment 1. See also Affiliation Memo between Pultwen and the U.S. trading company and Final Affiliation Memo.

Section 776(a)(2) of the Act provides that if an interested party or any other person: (1) withholds information that has been requested by the administering authority; (2) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (3) significantly impedes a proceeding under this title; or (4) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) and (e) of the Act, use the facts otherwise available in reaching the applicable determination.

In this case, Kremny/SKU and Pultwen failed timely to provide material documents that the Department requested during the investigation. On four separate occasions, the Department requested that Kremny/SKU and Pultwen report the U.S. trading company's resales of silicon metal, purchased from Pultwen, to unaffiliated parties during the POI, and that they provide a complete Section C questionnaire response for their affiliated U.S. trading company; the Department made these requests on July 3, July 30, August 20, and August 28, 2002. Kremny/SKU and Pultwen failed to provide the information until October 1, 2002, nearly four weeks after the final September 4, 2002, deadline set by Department in its August 28, 2002, request.

Kremny/SKU and Pultwen do not dispute that they did not submit a Section C questionnaire response for the U.S. trading company within the deadlines established by the Department. In their August 27, 2002, submission, ZAO Kremny/SKU and Pultwen Ltd. explained that "despite repeated requests, {the U.S. trading company} has declined to provide this information" and thus "it is regrettably impossible to comply with the Department's request." See August 27, 2002, submission at 4-5; and see also August 13, 2002, submission at 4-5.

However, on September 13, 2002, the signature date of the Preliminary Determination, Kremny/SKU and Pultwen notified the Department that they would submit the U.S. trading company's sales data and response to the Section C questionnaire "shortly." See September 13, 2002, submission. As previously noted, in its last request for information, the Department requested that Kremny/SKU and Pultwen provide the U.S. trading company's sales data and Section C questionnaire response no later than September 4, 2002. Kremny/SKU and Pultwen finally provided this information to the Department on October 1, 2002 –one month after the Department's final deadline for the receipt of this information, nearly three months after the initial request for the data, and over five months after the

Department issued its initial Sections A, C, and D questionnaires to Kremny/SKU and Pultwen. Consequently, pursuant to 19 CFR 351.301(c)(2), the Department on October 31, 2002, rejected Kremny/SKU's and Pultwen's submission of the U.S. trading company's sales data as untimely. For these reasons, the use of partial facts available for the U.S. trading company's sales is appropriate.

The Department may apply an adverse inference if it finds that a respondent failed to cooperate by not acting to the best of its ability. The record evidence strongly suggests that Kremny/SKU and Pultwen could have provided sales data for the U.S. trading company in a timely manner had they chosen to do so. As a preliminary matter, Kremny/SKU and Pultwen did manage to submit a timely response to the Department's Section A questionnaire with respect to the U.S. trading company on July 26, 2002. Secondly, after the Department published the Preliminary Determination in this case on September 20, 2002, in which it applied adverse facts available to the missing sales data from the U.S. trading company, Kremny/SKU and Pultwen then offered to provide the U.S. trading company's data. Thirdly, there is little evidence on the record that Kremny/SKU or Pultwen made meaningful to provide the information in a timely manner. Although Kremny/SKU and Pultwen submitted one negative letter from the U.S. trading company, in which the trading company declined to provide sales data, Kremny/SKU and Pultwen have not provided evidence to support their assertion that a concerted effort was made to procure the trading company's cooperation. Accordingly, the Department stated in its October 31, 2002, letter to Kremny/SKU and Pultwen, that "based on the evidence on the record, it appears that the {U.S. trading company's} sales' data could have been provided to the Department by the previously established deadlines." See October 31, 2002, letter rejecting Kremny/SKU and Pultwen's October 1, 2002, response.

Therefore, based on the substantial evidence on the record, the Department finds that Kremny/SKU and Pultwen failed to cooperate to the best of their ability in this investigation when they failed to provide their affiliated U.S. trading company's sales data in a timely matter. Moreover, the company's failure was unreasonable. Kremny/SKU and Pultwen have not alleged that their failure to submit the missing sales data was due to inadvertence or clerical error, and Kremny/SKU and Pultwen's subsequent conduct demonstrates that they were capable of complying with the Department's requests for information if they desired to do so.

The sales information that Kremny/SKU and Pultwen failed to provide for their affiliated U.S. trading company was highly relevant to the Department's fundamental dumping margin calculation. The sales at issue represent a significant portion of Kremny/SKU's and Pultwen's U.S. sales. The Department bases its margin calculation on the first sale to an unaffiliated U.S. customer. As petitioners noted, according to section 772(a) and (b) of the Act, sales between affiliated parties cannot be used as the basis for U.S. price. As a result of the failure of Kremny/SKU and Pultwen to timely provide sales data for the U.S. trading company, the Department was unable to include these sales in its calculation of the weighted-average U.S. price which it uses to calculate the margin for the producer.

Kremny/SKU and Pultwen's failure to respond in a timely manner to the Department's repeated

requests for this sales data, therefore, impeded the Department's ability to calculate an accurate margin for Kremny/SKU and Pultwen. We disagree with Kremny/SKU and Pultwen that the Department could have used the sales information on the record from the affiliated U.S. trading company for two main reasons. First, the Department does not have the starting price or quantity for the CEP sales from the affiliated U.S. trading company during the POI, and the record does not contain complete and verifiable information for the affiliated U.S. trading company's expenses. Additionally, because EP sales are reported based on entry date into the United States during the POI while CEP sales are reported based on the date of sale by the U.S. affiliate during the POI, a change in the classification from EP to CEP may well result in a different universe of sales being reported.

The Department would normally use sales from the U.S. trading company to the first unaffiliated U.S. customer to calculate the dumping margin. Because Kremny/SKU and Pultwen did not report the U.S. trading company's significant resales of silicon metal, however, we must use the facts available. We cannot determine the volume of U.S. sales made by the affiliated U.S. trading company because of the failure of respondents to submit the requested sales data in a timely matter. Therefore, based on the significant proportion of sales to the affiliated U.S. trading company, we must presume that sales of the subject merchandise by the affiliated trading company are also significant. We are therefore, applying facts available to that quantity of U.S. sales sold to the affiliated U.S. trading company during the POI.

Contrary to the assertions of Kremny/SKU and Pultwen, the facts in SSSS from France, SSSS from Germany, Bicycles from the PRC, and SRAMs from Taiwan are distinguishable from those here. In those cases the Department used facts available for small reporting failures by respondents. However, in this case the unreported sales represent a significant portion of Kremny/SKU and Pultwen's sales and were not sales discovered or reported at verification as in SSSS from Germany, Bicycles from the PRC, and SRAMs from Taiwan. Here, as in Hot-Rolled Steel from South Africa and Forged Hand Tools from the PRC, the Department used total adverse facts available when the respondent failed to report a substantial portion of its U.S. sales. Additionally, in SRAMs from Taiwan and SSSS from Germany, the Department was able to use the "highest non-aberrant margin" calculated to determine the margin for the sales in question. See SRAMs from Taiwan and SSSS from Germany. Here, in contrast, there was no applicable "non-aberrant margin" for the Department to apply because the unreported CEP sales represented a substantially different sales channel than Kremny/SKU and Pultwen's EP sales used in the margin calculation. A calculated margin based on EP sales would not account for additional expenses related to CEP sales. It would therefore not be appropriate to apply to the unreported CEP sales of the affiliated U.S. trading company.

In the Preliminary Determination, the Department limited the application of facts available to Kremny/SKU and Pultwen's sales through the U.S. trading company. This was because we found that partial adverse facts available was sufficient to compel the parties to cooperate in the future, and therefore, it was not necessary to apply total adverse facts available in this investigation. These mitigating factors are equally applicable in the final determination. Consequently, pursuant to section 776(a) of the Act, in reaching our final determination, we have used partial adverse facts available for

Kremny/SKU. We are valuing the volume of Kremny/SKU and Pultwen's sales to their affiliated U.S. trading company using the highest calculated margin in this investigation.

For the final determination, BAS's calculated margin is less than the margin in the petition. Section 776(b) of the Act also provides that an adverse inference may include reliance on information from the petition. See also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 at 870 (1994) ("SAA"). Section 776(c) of the Act provides that where the Department selects from among the facts otherwise available and relies on "secondary information," such as the petition, the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA states that "corroborate" means to determine that the information used has probative value. See SAA, at 870. The petitioners' methodology for calculating the EP and NV, in the petition, is discussed in the initiation notice. To corroborate the petitioners' EP calculations, we compared the prices in the petition to the prices submitted by respondents for silicon metal. Based on a comparison of the U.S. Census Bureau's official IM-145 import statistics with the average unit values in the petition, we find the export price suggested in the petition to be consistent with those statistics. To corroborate the petitioners' NV calculation, we compared the petitioners' factor consumption data to the data reported by respondents and found them to be similar. Finally, we valued the factors in the petition using the surrogate values we selected for the final determination. However, by using the surrogate values we selected for the final determination, the petition margin is lower than BAS's calculated margin. Therefore, for the final determination we have continued to apply partial adverse facts available to the quantity of unreported sales by the U.S. trading company using BAS's calculated margin for the final determination.

#### **Comment 20: Valuing of inland freight added to surrogate import values for raw materials**

BAS and RTL argue that the Department artificially inflated normal value by adding freight charges to the surrogate values for coal, coke, electrodes, wood chips, charcoal, and big bags, because these import values already included freight costs. BAS and RTL explain that the Department used import values, which were reported on a cost, insurance, and freight-inclusive ("CIF") basis, to value the factors of production. BAS and RTL state that CIF means that the freight charges from the foreign supplier to the purchaser were already included in the import values. BAS and RTL contend that the resulting total freight charge is excessive due to the great disparity between Russia and Egypt in the distances that imported inputs must be shipped in order to reach the producer.

BAS and RTL explain that in Sigma Corporation v. United States, the Court remanded to the Department to recalculate the normal value using a more realistic methodology rather than the Department's previous methodology of assuming that producers would purchase inputs at the surrogate import value from a domestic source and not import inputs even when the nearest port was closer than the domestic supplier. See Sigma Corporation v. United States, 117 F.3d 1401 (Fed. Cir. 1997) ("Sigma v. United States"). BAS and RTL state that as a result of Sigma v. United States, the Department's policy is to add freight to surrogate import values based on the lesser of the distances

between the producer and the nearest port or the domestic supplier. BAS and RTL contend that Sigma v. United States, did not mandate this particular methodology be applied to all cases, but rather that surrogate values should not include freight charges based on unrealistic assumptions about the purchasing decisions of producers.

BAS and RTL speculate that the Egyptian CIF import price is economically prohibitive for a Russian producer located thousands of kilometers from the nearest port, whereas an Egyptian producer may import raw materials and transport them relatively short distances from port to factory, in a country of no more than 1000 kilometers spanning east to west, according to the CIA World Factbook. See CIA World Factbook (2002). Furthermore, BAS and RTL note that the website of the Egyptian ferroalloy producer Sinai Manganese indicates that it operates a port at its facilities. See <http://www.smc-eg.com/Port.htm>. Thus, BAS and RTL argue that the Department should not use a normal value in its margin calculation, that is based on the assumption that Russian producers would import raw materials and pay total freight charges far in excess of any conceivable delivered price that would be paid by a producer in the surrogate country. BAS and RTL contend that the closest surrogate for delivered prices is either the CIF import value without additional freight charges added, or alternatively, the CIF import value with an inland freight charge reflecting 100 kilometers.

Petitioners contend that the a price on a CIF basis only includes freight to the port, and not inland freight from the port to the customer. See International Trade Terms, International Trade Data System (ITDS), U.S. Department of Treasury, <http://www.itds.treas.gov/glossary1.html>. Petitioners argue that the Department correctly calculated inland freight expense and added to the import surrogate values, in accordance with Sigma Corp. v. United States. Petitioners explain that the Department calculated a per-unit freight amount for each input for each Russian producer based on the shorter of the distance from the Russian produce to either the Russian supplier of the input or the nearest seaport. Petitioners contend that the Department has applied this methodology consistently and in numerous NME cases.<sup>8</sup>

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<sup>8</sup> See Notice of Final Determination of Sales at Less Than Fair Value: Ferrovandium from the People's Republic of China, 67 FR 71137 (November 29, 2002) and accompanying Issues and Decision Memorandum, at Comment 21; Heavy Forged Hand Tools From the People's Republic of China: Final Results and Partial Recission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 67 FR 57789 (September 12, 2002) and accompanying Issues and Decision Memorandum, at Comment 17; Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China, 67 FR 31235, 31239 (May 9, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from the People's Republic of China, 66 FR 61197, 67201 (December 28, 2001); Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Automotive Replacement Glass Windshields From the People's Republic of China, 66 FR 53776, 53777 (October 24, 2001); Notice of Final Determination of Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat

Additionally, petitioners note that the CIT upheld both this methodology and the Department's inclusion of inland freight in the calculation of surrogate values. Petitioners explain that in Sigma Corp. vs. United States, the CIT stated that: "the CIF surrogate price alone does not properly account for the entire cost of freight...it represents the cost to get the raw materials to the Chinese port, but it does not include the freight cost incurred by a producer to get the materials from the Chinese port to the castings foundry. The inland freight cost is necessary to account for that additional transportation cost." See Sigma Corp. v. United States, 86 F. Supp. 2d 1344 (CIT 2000). Petitioners contend that BAS and RTL are trying to avoid the addition of substantial surrogate-valued freight costs incurred by BAS, as well as Kremny and SKU, on material inputs, where the inputs are valued using import values. Petitioners note that Kremny and SKU purchased imported coal and then incurred additional freight costs to ship the material first by sea and then by rail. Petitioners also note that Kremny purchased imported electrodes shipped from the port of entry to its factory. Petitioners contend that the imported shipment distances show that the distances from the Russian producers to the nearest seaport are even greater than the distances to most of the domestic suppliers. Thus, petitioners argue that the Department should continue to include adjustments for inland freight in the calculation of surrogate values based on import values.

**Department's Position:** We agree with petitioners that the Department should continue to include adjustments for inland freight in the calculation of surrogate values. For the certain inputs, coal, coke, electrodes, wood chips, charcoal, and big bags, the Department used import values, which were reported on a cost, insurance, and freight-inclusive ("CIF") basis, to value the factors of production. However, CIF does not include freight from the port to the customer. CIF includes the freight charges to transport the material from the point of production to the port in the customer's country. See Sigma Corp. v. United States, 86 F. Supp.2d 1344, 1348. (Ct. Int'l Trade 2000) citing Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 56 FR 2742 (January 24, 1991).

BAS and RTL's argument that the comparison between the geographic size of the surrogate country and the geographic size of the home market country be considered in determining whether to add the freight from the port to the customer in the home market country is without merit. The Department is not double-counting any portion of the freight cost merely because respondent's speculate that it would cost more to transport material to Egypt than to Russia. The CIF import price used in the Preliminary Determination did not include freight from the port to the customer, and therefore the Department has included this freight in its calculation. The fact that Egypt is geographically smaller than Russia does not mean that the Department double-counted freight or that the Department should not include freight from the port to the customer. The Department only added a constructive freight cost for the portion of the trip that was not accounted for in the CIF price and was "necessary to account for that additional transportation cost." See Sigma Corp. v. United States, 86 F. Supp. 2d 1344 (CIT 2000).

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Products from Romania, 66 FR 49625, 49627 (September 28, 2001).

This has consistently been the Department's practice and was upheld by the Court of International Trade.<sup>9</sup> Therefore, the Department will continue to add the freight to all surrogate values that were derived from import statistics, for the distance between the home market port and the customer because these freight charges are not already included in CIF import statistics. We will did not make any changes to the final determination with regard to this issue.

### **Comment 21: Packing materials**

BAS and RTL argue that at verification the Department examined the "big bags" used for silicon metal and verified that the "big bag" used by BAS "weighed approximately 3 kg," and therefore, the Department should use the verified weight of the "big bag" to calculate the per-bag value, and not the estimated weight of 10 lbs used in the Preliminary Determination. See BAS Verification Report, at page 6.

**Department's Position:** We agree with BAS and RTL that the Department should use the verified weight of the "big bag" to calculate the per-bag value, and not the estimated weight used in the Preliminary Determination. At verification the Department examined the big bags used for silicon metal and noted in the verification report that each bag weighed approximately 3kg. See BAS Verification Report at 6. Thus, since the weight of 3kg has been verified and is on the record, the Department considers this weight more appropriate than the estimated weight used in the Preliminary Determination and therefore used the weight of 3kg per bag to calculate the per-bag value for BAS and RTL for the final determination.

### **Comment 22: Electricity Usage**

BAS and RTL argue that the electricity usage determined from the meter readings at each of BAS's furnaces more precisely measures the usage of electricity in silicon metal production. BAS and RTL note that the Department verified BAS's reported electricity usage rates, as well as the electricity usage rates based on the meter readings at each furnace, and verified that the meter readings for the POI were lower than the usage rates reported by BAS in its submissions. See BAS Verification Report, at Exhibit 12. Therefore, BAS and RTL contend the Department should use an electricity usage rate calculated from the meter readings at the furnaces used to produce silicon metal.

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<sup>9</sup> See e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From the People's Republic of China, 67 FR 31235, 31239 (May 9, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from the People's Republic of China, 66 FR 61197, 67201 (December 28, 2001) and Sigma Corp. v. United States, 86 F. Supp.2d 1344, 1348. (Ct. Int'l Trade 2000).

Petitioners contend that the record contradicts BAS's argument that the electricity usage based on the furnace meter readings more precisely measures the usage of electricity in silicon metal production. Petitioners explain that BAS asserted at verification that it does not use the furnace performance reports, in which BAS records furnace meter readings, to determine raw material usage because "the furnace reports vary due to human error and rounding." See BAS Verification Report, at page 9. Additionally, petitioners note that BAS officials stated that BAS experienced electricity losses in the lines between the electricity substation and the furnace electricity meters. See id., at page 14. Petitioners argue that electricity losses in the lines are substantial and unavoidable in ferroalloy production and are not captured in the furnace meter readings because they occur upstream from the meters. Petitioners contend that it is the Department's practice to include line losses in the calculation of electricity consumption in NME proceedings. Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review, 66 FR 8383, (January 31, 2001) ("Glycine from the PRC") and accompanying Issues and Decision Memorandum, at Comment 4. Thus, petitioners argue that BAS's electricity usage is properly determined based on the allocated portion of the electricity recorded in the substation meters, which include subsequent line losses. Petitioners note that the Department verified the electricity consumption BAS reported based on the meter readings at its electricity substation and noted no discrepancies. See BAS Verification Report, at page 14. Petitioners also note that the Department did not state whether they verified the accuracy of the furnace meter readings. Additionally, petitioners state that at no time prior to or during verification did BAS advise the Department that it had overstated its reported electricity usage rate.

**Department's Position:** We agree with petitioners that BAS's electricity usage is properly determined based on the allocated portion of the electricity recorded in the substation meters, which includes subsequent line losses. It is the Department's practice to treat electrical line loss as actual costs that are incurred in the production of subject merchandise. See Glycine from the PRC. At verification, the Department examined BAS' reported electricity usage rates, as well as the electricity usage rates based on the meter readings at each furnace, finding that the meter readings for the POI were lower than the usage rates reported by BAS in its submissions. See BAS Verification Report, at page 14. However, BAS officials stated at verification that they did not use the furnace performance reports, where they record furnace meter readings, because the "reports vary due to human error in observation and recording." See BAS Verification Report, at page 9. Further, BAS officials stated at verification that electricity losses occurred in the lines between the substation and the furnace electricity meters. See BAS Verification Report, at page 14. Therefore, because the electricity meters at each furnace do not account for the loss of electricity in the lines, they do not precisely measure the actual usage of electricity in the production of silicon metal. Thus it would be improper to use the electrical meters to calculate electrical usage. We have continued to use BAS's reported electricity usage rate for the final determination.

### **Comment 23: Insurance Expenses**

BAS and RTL contend that RTL's general insurance policy expenses were properly excluded by the

Department in the Preliminary Determination because the expenses constitute a fixed cost that was incurred for the total operations of the company rather than a specific product. BAS and RTL explain that this general insurance policy covers losses occurring during the shipment of various products. However, BAS and RTL explain that the transportation companies are legally responsible for any losses occurring during the shipment, and in practice, the general insurance policy is not applied to shipments of silicon metal because the trucking and rail companies that perform the shipments are responsible for any losses during shipment. BAS and RTL contend that the general insurance policy would be more properly classified as an indirect selling expense, and therefore, would be improper for the Department to deduct this expense in its calculation of export price.

**Department's Position:** We agree with BAS and RTL that the general insurance policy should be classified as an indirect selling expense. While the general insurance policy does cover losses occurring during shipments of their various products, because the premium is applied to all shipments of RTL's material, it is therefore more appropriately considered to be an indirect expense. In NME proceedings the Department does not directly value indirect selling expenses in the calculation of EP sales, but rather indirect selling expenses are captured within the SG&A surrogate expense ratio. Therefore, the insurance expense is captured in the SG&A expense ratio and does not constitute a direct selling expense to be deducted from the calculation of export price.

#### **Comment 24: Labor hours**

BAS and RTL contend that the labor hours for crane operators, who are involved in both silicon metal and ferrosilicon production, and verified by the Department, should be allocated between silicon metal production and ferrosilicon production. BAS and RTL explain that the Department should not use the labor hours for the four crane operators in their entirety.

**Department's Position:** We agree with BAS and RTL that the labor hours for crane operators, who are involved in both silicon metal and ferrosilicon production should be allocated between silicon metal production and ferrosilicon production. At verification, BAS explained that other workers, who actually work in the ferrosilicon department, had been included in the calculation of labor hours for silicon metal production. The Department then confirmed the reported deductions for labor hours involved in ferrosilicon production from the calculation of labor hours for silicon metal production. See BAS Verification Report at 12-13. Therefore, for the final determination, the Department allocated the labor hours of the crane operators appropriately between the ferrosilicon production and silicon metal production.

#### **Comment 25: Electrodes**

BAS and RTL contend that electrodes are indirect materials, and therefore, should be classified as overhead in the final determination. BAS and RTL explain that it is the Department's practice to classify consumable items, materials that are consumed during the production process but are not

physically incorporated into the final product, as indirect materials, and consider the costs of these items to be overhead expenses. BAS and RTL cite Ammonium Nitrate from Ukraine, Brake Drums and Brake Rotors from the PRC, Bicycles from the PRC, and Extruded Rubber Thread from Malaysia in support.<sup>10</sup>

Petitioners contend that the Department “normally uses one respondent’s market economy purchases to value another respondent’s factors as a last resort when no other reasonable values are available.” See Certain Cased Pencils from the People’s Republic of China; Final Results and Partial Recision of Antidumping Duty Administrative Review, 67 FR 48612 (July 25, 2002) and accompanying Issues and Decision Memorandum, at Comment 4. Petitioners explain that there is a useable Egyptian value on the record. Petitioners state that the Department should continue to value BAS’s consumption of electrodes using the Egyptian electrode value used in the Preliminary Determination.

Additionally, petitioners contend that the electrodes are not indirect materials because the amount of electrodes consumed varies directly with the production of silicon metal because the tip of the electrode, which delivers electricity to the charge of quartz and carbonaceous reductants in the furnace, is continually burned off in the production process and must be replaced on a regular basis. Petitioners argue that indirect materials do not vary directly with the amount of output produced. Furthermore, petitioners contend that carbon electrodes constitute a major cost of production that are consumed in a significant quantity. Petitioners argue that the Department has treated electrodes as direct materials in Silicomanganese from Kazakhstan. See Silicomanganese from Kazakhstan Final Determination.

Petitioners contend that if the Department determines that electrodes are part of factory overhead, then the Department needs to value electrodes directly. In the Preliminary Determination, the value used for factory overhead did not include any amount for indirect or auxiliary materials, but only a calculation based on depreciation. Petitioners argue that according to Section 773(c) of the Act, the Department includes surrogate-valued amounts for all “quantities of raw materials employed” in calculating NV. Thus, as in Silicomanganese from Kazakhstan, where the Department directly valued certain auxiliary materials because the amounts for these materials were not captured in the factory overhead rate, the Department should continue to directly value carbon electrodes, and should do the same with respect to Kremny’s auxiliary materials. See Silicomanganese from Kazakhstan Final Determination.

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<sup>10</sup> See Notice of Final Determination of Sales At Less Than Fair Value: Solid Agricultural Grade Ammonium Nitrate From Ukraine, 66 FR 38632 (July 25, 2001) (“Ammonium Nitrate from Ukraine”) and accompanying Issues and Decision Memorandum, at Comment 6; Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People’s Republic of China, 62 FR 9160, 9169 (February 27, 1997) (“Brake Drums and Brake Rotors from the PRC”); Bicycles from the PRC; and Notice of Final Determination on Extruded Rubber Thread from Malaysia, 57 FR 38465, 38470 (August 25, 1992) (“Extruded Rubber Thread from Malaysia”).

**Department's Position:** We agree with Petitioners. Even though the electrodes used by BAS in the production process are not physically incorporated into the final product, the Department has decided that when such materials are used regularly and in significant quantities, they cannot be considered to be part of a company's overhead costs as "consumables." See Silicomanganese from the PRC, at Comment 1 (Part IV). The Department concluded that when such materials are used infrequently and in small quantities they are usually included in factory overhead as "consumables." However, when such materials are used regularly and in significant quantities, the company may choose not to allocate the cost of the material to the total production of the goods, as overhead costs, but rather, to assign the specific costs directly to the finished product. See id.

In this case, at verification, BAS officials stated that part of electrodes were burned away each day and are continually replaced at the top as the bottom burns away. See BAS Verification Report, at pages 4-5. BAS officials explained that electrodes are accounted for as a consumable in its balance sheets. See id., at page 5. BAS officials also stated that electrodes are recorded in the same accounting section as raw materials. See id., at page 5. Furthermore, upon the Department's examination of BAS' raw material inventory records, which showed the transfer of raw materials into the production of silicon metal, the Department noted that electrodes are kept in the normal books and records with other raw materials. See id., at page 9. Thus, as in Silicomanganese from the PRC, the electrodes in this case cannot be treated as overhead expenses because BAS uses the electrodes regularly and in significant quantities in its

production of silicon metal and because, in its own accounting records, it treats the electrodes as a raw material for production, not as an overhead expense. Thus, we will continue to directly value electrodes in the final determination as a factor of production in our calculation of the normal value for both respondents.

**RECOMMENDATION:**

Based on our analysis of the comments received, we recommend adopting the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final determination in the investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

AGREE \_\_\_\_\_ DISAGREE \_\_\_\_\_

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Faryar Shirzad  
Assistant Secretary  
for Import Administration

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Date